IN THE

Supreme Court of the United States

OCTOBER TERM, 1899.

CHICAGO, MILWAUKEE & ST. PAUL RAILWAY COMPANY, *Petitioner*,
vs.
C. H. BOSWORTH, *Receiver*,
No. 62.

HUNTING ELEVATOR COMPANY, *Petitioner*,
vs.
C. H. BOSWORTH, *Receiver*,
No. 63.

JACOB RAU, *Petitioner*,
vs.
C. H. BOSWORTH, *Receiver*,
No. 64.

ON WRITS OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR SEVENTH CIRCUIT.

Brief and Argument for Respondents.

BLUFORD WILSON,
PHILIP BARTON WARREN,
Counsel for Respondents.

STATEMENT.

NOTE—By reason of the fact that the evidence in this case was also taken in that of *Jacob Rau vs. C. H. Bosworth, Receiver*, it was agreed to print only one record, and the references in this brief to record pages are to the record in the Rau case, October Term, 1898, No. 285 (16,858).

The Chicago, Milwaukee & St. Paul Railway Company.

The intervener, the Chicago, Milwaukee & St. Paul Railway Company, was the owner of thirty-eight (38) cars mentioned and described in its petition. During the evening of the 28th day of October, 1894, while on the tracks of the Terminal Railroad Association of St. Louis, in its yards at East St. Louis, they were damaged by fire to the extent of $9,033.73.

The destination of these cars was shown by the way-bills, which accompanied them, except in a few cases, and in those cases by a copy of the shipper's receipt. It appears that no original shipper's receipts were issued. After the fire the shippers demanded of the initial carrier, the said St. Paul Company, receipts in aid of these suits, but the agent of the railway company would not issue them without marking them "copy" or "duplicate." These way-bills and receipts were introduced in evidence by interveners. (R. p. 266) As to all the cars, except five, the way-bills show that they were to be moved from their point of receipt to East St. Louis, although in a column under the head of "marks and consignees" the name of the consignee and the words "St. Louis, Missouri," appear. As to one car, No. 46064, the way-bill reads from Wykoff, Minnesota,

to St. Louis. This, however, is apparently a mistake, inasmuch as the shipment consisted of that car and another numbered 43222, and the way bill for the latter read from "Wykoff to East St. Louis." They both arrived at East St. Louis, October 25th, the same hour and train, 1:45 p. m. (R. p. 237). In addition to this, on the station receipts for these two cars, under head of marks and consignees, appear the words "The Orthwein Grain Company, East St. Louis." (R. pp. 158–161, 173).

As to cars Nos. 10071, 34908, 10536 and 3218, the way-bills introduced in evidence read on their face "Way-bill of freight forwarded from Lake City to St. Louis." These four way-bills are marked "Copy" and there is nothing in the evidence to show that they are true copies or why the originals were not introduced. The cars went into yard at East St. Louis and were destroyed, along with other barley cars in store there.

The initials, numbers, route, origin and destination of the cars, were as follows:

Initials.	Numbers	From	To	
C., M. & St. P.	32986	La Crosse, Wis.	East St. Louis	R. pp. 141-145.
" " " " "	20022	" "	" "	
" " " " "	1100	" "	" "	
" " " " "	6842	McGregor, Iowa	" "	R. pp. 149-150.
" " " " "	10720	" "	" "	
" " " " "	18126	" "	" "	
" " " " "	3728	" "	" "	
" " " " "	4126	" "	" "	
" " " " "	2598	" "	" "	
" " " " "	12336	" "	" "	
" " " " "	37506	" "	" "	

Initials.	Numbers	From	To	
C., M. & St. P.	11836	Prairie DuChien, Wis.	East St. Louis	R. pp. 154-155-161-162
" " " "	33090	" "	" "	
" " " "	16802	" "	" "	
" " " "	12	" "	" "	
" " " "	680	Wykoff, Minn.,	" "	
" " " "	46064	" "	St. Louis	
" " " "	43222	" "	East St. Louis	
(Station receipts for cars No. 46064 and 43222 under marks and consignees is "The Orthwein Grain Co., East St. Louis."				
C., M. & St. P.	43080	Lime Springs	East St. Louis	
" " " "	32194	"	" "	
" " " "	34574	"	" "	
" " " "	17272	La Crosse	" "	R. pp. 154, 246, 248
" " " "	3524	Savannah	" "	
" " " "	31098	"	" "	
" " " "	33134	"	" "	
" " " "	2430	"	" "	
" " " "	31204	"	" "	
" " " "	46992	"	" "	
" " " "	15944	"	" "	
" " " "	6364	"	" "	
" " " "	12886	"	" "	
" " " "	10071	Lake City	St. Louis	
" " " "	34908	"	"	
" " " "	10536	"	"	
" " " "	3218	"	"	
" " " "	1232	La Crosse	East St. Louis	R. p. 145-6
" " " "	1154	Ossian, Iowa	" "	
" " " "	38108	" "	" "	

The statement at page 3 of opposing counsel's brief that "the destination of all the barley shipments was St. Louis, Missouri," is thus squarely in conflict with the way-bills and bills of lading. The stipulation referred to by counsel, is that the barley was "consigned to the Teichman Commission Company, St. Louis, Missouri, via East St. Louis, Illinois." This is simply the name and place of residence of the consignee, *not the place of destination.* We agreed only as to the *person* to whom it was consigned, *not as to the place of destination.* There is a radical difference between the meaning of the words "consigned" and

"destined;" the former refers *only* to persons and implies the transfer of something in trust (*Ency. Law, Vol. VI, 2d Ed., 798*), while the latter refers only to place. Thus "consigned" to Teichman, of St. Louis, but "destined" to East St. Louis, there to be held, as shown by the evidence, until re-sold and re-billed to fresh and final destination.

In the statement of facts by the Circuit Court of Appeals it is said:

> "It satisfactorily appears further that it was the custom of brokers and buyers at St. Louis to leave in the cars until sold, certain classes of goods, and particularly consignments of barley, received upon the track of the Terminal Railroad Association, whether billed to St. Louis or East St. Louis, the mode of selling goods so held being by samples taken on the arrival of cars by agents of the consignees employed to visit daily the yards for that purpose." (R. p. 343)

But aside from the way bills and bills of lading the testimony abundantly shows that East St. Louis was the "port of entry" for that class of goods for St. Louis, and was therefore the end of transit under the only contract to which the receiver was a party. (R. p. 231.)

Jacob Rau.

The intervener, Jacob Rau, delivered to the Chicago, Milwaukee & St. Paul Railway Company, on the 10th and 16th days of October, 1894, two car loads of barley, Nos. 46064 and 43222; said barley was damaged or destroyed by the same fire, while in the yards

of the Terminal Railroad Association at East St. Louis, to the extent of $1,144.07; the said cars were consigned as follows:

No. 46064, from Wykoff to St. Louis, as shown by way-bill, but as shown by station receipt destination appeared to be East St. Louis; No. 43222, from Wykoff to East St. Louis. (R. pp. 36, 158, 160–1.)

Huntting Elevator Company.

The intervener, the Huntting Elevator Company, delivered to the Chicago, Milwaukee & St. Paul Railway Company ten car loads of barley on the following days: On the 24th day of September, 1894, cars Nos. 11836 and 33090; on the 13th day of October, car No. 34574; on the 15th day of October, car No. 32194; on the 18th day of October, car No. 43080; on the 12th day of October, car No. 12; on the 20th day of October, cars Nos. 178, 7285, 16802 and 46648; the said barley was damaged by the same fire to the extent of $2,600.56, while in the yards of the Terminal Railroad Association at East St. Louis; the cars were consigned as follows: (R. pp. 35–38, 154, 155, 161, 162.)

Initials.	Numbers.	From.	To.
C., M. & St. P.	11836	Prairie DuChien	East St. Louis
" " " " "	33090	" "	" "
" " " " "	16802	" "	" "
" " " " "	46648	" "	" "
" " " " "	7285	" "	" "
" " " " "	178	" "	" "
" " " " "	12	" "	" "
" " " " "	43080	Lime Springs	" "
" " " " "	32194	" "	" "
" " " " "	34574	" "	" "

The foregoing statement is of facts about which there is no dispute, the greater portion of which is stipulated. (R. pp. 31, 47.)

The barley was hauled by the Chicago, Milwaukee & St. Paul Railroad Company from the respective points of receipt to Rock Island; there delivered to the Rock Island & Peoria Railway, and hauled to Peoria; there delivered to the Peoria & Pekin Union Railway, and hauled to Pekin; there delivered to the receiver of the Chicago, Peoria & St. Louis Railway, and hauled to the terminus of his line in East St. Louis, and there delivered, upon the designated "Ys" of the Terminal Railroad Association, where the engines of that Association took the cars and set them on its own tracks, in its own yards, at East St. Louis. (R pp. 74, 184, 187, 207, 209. 213, 222, 229.) At the time of the fire these cars had been accumulating at this last point for some time, one of them coming in as early as September 28, others about the middle of October, and others not until the afternoon of the night of the fire. (R. p. 237.)

This barley was to be sold again by the consignees, grain brokers in St. Louis, and by arrangement between them and the Terminal Railroad Association it was to have been held, storage free, at the place where it was damaged, until such sales could be effected and a re-consignment of the barley made to the con-

suming purchasers from the grain brokers. (R. pp. 75, 140, 162, 238, 242, 243, 244, 187, 191, 210, 211, 216, 219, 229, 306, 308.) The periods during which such cars ordinarily remained on the tracks at East St. Louis was determined by the sale of the barley by the consignees, which in its turn was controlled by the state of the market. (R. pp. 190, 238, 242, 308.)

See also statement of facts by the presiding circuit judge in the opinion of the court below. (R. pp. 340-344.)

We especially challenge the accuracy of the following propositions of fact found in the "Statement of the Case" by opposing counsel.

1. "*The remaining sixteen cars were repaired by the receiver and no claim for damage is made as to them.*" (Brief pp. 2, 65, 66.)

The statement is misleading and unfair. The repairs were made by the receiver under express written stipulation with the Terminal Association that such repairs should be made as matter of salvage, but without prejudice to the receiver in the controversy as to liability. (R. pp. 61, 124, 125, 219, 220, 223, 231, 236.)

2. "*And so far as the record shows the receiver did collect such insurance.*" (Brief p. 13.) The statement is repeated. (Brief p. 47.) The obvious purpose is to

show that the receiver had recognized and accepted liability in the premises. The wholly gratuitous charge is thereupon made that "*the claims* (in opposition to such liability) *which the receiver now puts forth are an afterthought.*"

It is difficult to deal calmly with such careless, if unintentional, mis-statements of the evidence. Gregory, a witness in behalf of the receiver, testifies that the claim was presented to the insurance companies under the sixty day limiting clause *and was rejected.* (R. p. 138.) Bosworth, the receiver, explicitly testified that the insurance companies had not accepted the claim. (R. p. 225.) The master's report shows that the receiver's action in filing his claim against the insurance company was "because of the time limit imposed by the insurance policies," and like the matter of salvage, was to be without predjudice. (R. p. 61.) It further appears of record that the question was as to whether "the barley is covered by their (the receiver's) insurance policy or by the one held by the Terminal Railway Company, which will soon be determined, as that company is co-operating with the J. S-E. R. R (the receiver) to effect an adjustment." (R. pp. 58, 321.)

As the claim of the receiver was rejected by the insurance company the presumption is clear from the evidence, as to the place and details of the fire, that

the claim was declined because the rails upon which the property was stored at the time of the fire did not belong to the receiver, and were not under his control. It has never been questioned that the legal title to the rails was in the Terminal Association, and as shown by the evidence, were under its exclusive control.

> "In the case at bar the connecting carrier (Terminal Association) not only took exclusive possession of the cars in controversy at the terminus of the appellant's (the receiver's) rails, but hauled them to a point on its own rails to which appellant had, neither in law nor by contract, even a right of access." (Judge Showalter's opinion, R. pp. 363, 358.)

3. And so all the acts attributed in their "Statement," by opposing counsel, to the receiver, touching the handling, storage, and re-billing and forwarding the grain after its arrival at the end of the receiver's rails in East St. Louis, and its care, custody and control meanwhile, were, in fact, done by and were directly attributable to the Terminal Association or to the consignees. And this is especially true as to the culpable neglect of the Association, resulting in the fire and the loss, and the gross misconduct of its agents during the progress of the fire. We have dealt with these in the body of our brief It would take many pages to point them out in detail.

4. We object generally to the "Statement of the Case" by opposing counsel as being contrary to the

actual facts; to the plain tenor of the weight of the evidence and to the reasonable presumptions arising therefrom.

After the fire mentioned each one of the petitioners filed an intervening petition in the cause of the Mercantile Trust Company against the Chicago, Peoria & St. Louis Railway Company, pending in the Circuit Court of the United States for the Southern District of Illinois, in which C. H. Bosworth had been appointed receiver of the said railway company, and which railway, at the time of the fire, he was operating as such receiver. The petitions, however, make the railway company, and not the receiver, party defendant, and aver that the property destroyed was at the time "in the possession of and under the control of the said defendant railway company" as a common carrier. (R. p. 21.)

Our defense is that the Terminal Railroad Association of St. Louis, as warehouseman, either for itself as principal, or as agent for the consignees, had actual custody, care and control of the property at the time of the fire, which was caused, and the property destroyed, by its gross neglect (R. p. 22 and 43.)

The Terminal Railroad Association of St. Louis is a company owning tracks in East St. Louis and across the bridges into St. Louis, which connect the various railroads centering there. Its business is that

of hauling and interchanging cars coming in on one railroad for delivery to another; also to haul cars destined to St. Louis from the termini of the several railroads in East St. Louis, across the bridges into St. Louis; also storing freight for their customers. (R. p. 195.) As a regularly incorporated common carrier it performed like service for all railroads terminating at East St. Louis, its only competitor being the Wiggins Ferry Company. The contract originally entered into between the Association and the Peoria Company, prior to the receivership, contemplated only these classes of business, and fixed a charge for the same, *except cars on which the Terminal company received a bridge toll, which were to be handled free* of any charge to the Peoria company, the express language of the contract being: "Except cars on which the party of the first part (Terminal Association) receives a bridge toll, which will be handled free; empty cars in and out free." (R. p. 100.) All the cars in controversy, on the theory of the interveners, were *prima facie* of the "bridge toll" class.

When the petitioners filed their interventions in this cause, the receiver was not fully aware of all the circumstances surrounding the particular shipments of grain referred to in the various petitions. He therefore was compelled to make the best answer he could in the light of his knowledge at that time. He filed his answer to all of them, alleging delivery in the

due course of business, of all these shipments to the Terminal Railroad Association. Later on, during the taking of evidence, other facts were developed. To cover these the receiver filed an amended answer. In this amended answer he alleged that the shipments in question, at the time of the fire, had been delivered to the Association, and were under its sole custody and control *for the convenience of the consignees.* (R. pp. 43-44.)

The claims of the petitioners, except the Chicago, Milwaukee & St. Paul Railway Company, in which the claim is for damage to cars, are for damages to barley shipments caused by the fire of October 28th, 1894. These barley shipments originated in Iowa, Wisconsin and Minnesota, at various points on the Chicago, Milwaukee & St. Paul Railway.

All of these intervening petitions were consolidated, and the evidence taken was to apply to them all. The master, after having heard and considered the evidence, filed a separate report in the case of each petition, but inasmuch as nearly all the points in controversy are raised by the facts surrounding each petition, they have all been treated in one argument.

Upon hearing before the Master in Chancery he reported in favor of all of the interveners, to which reports exceptions, by the receiver, were duly taken and filed. (R p. 64.)

The matter then came on for hearing before the Circuit Court upon these exceptions, which upon consideration were overruled and decrees entered in favor of the interveners, in the amounts claimed by them, together with interest from the date of the master's report. (R. p. 67.)

From these decrees, appeals were prayed and perfected to the United States Circuit Court of Appeals for the Seventh Circuit, both by the receiver and the Chicago, Peoria & St. Louis Railroad Company of Illinois, the assignee of the purchaser of the railway property at the foreclosure sale. (R. p. 328, 331.) Said appeals came on for hearing in the Court of Appeals before their Honors, Judges Woods, Jenkins and Showalter, and were argued, and subsequently, on the 25th day of February, 1898, the Court of Appeals handed down its decision, wherein and whereby the decrees of the United States Circuit Court for the Southern District of Illinois, were reversed (R. p. 364); his Honor, Judge Jenkins, dissenting therefrom. (R. p. 350.)

On the 27th day of March, 1898, the appellees in the Court of Appeals, filed their respective petitions for rehearing (R. p. 366), which were subsequently, on or about the first day of April, 1898, overruled. (R. p. 367.)

From these decrees of the Court of Appeals, the appellees therein made application to this Court for writs of certiorari, which were granted.

The total amount of the loss occasioned by the fire was $46,607.74; the amount covered by the claims of the petitioners is $21,876.93. (R. pp. 165, 170.)

Of these claims, appeals have been perfected only by the Chicago, Milwaukee & St. Paul Railway Company, the Huntting Elevator Company, Jacob Rau, and Carr, Ryder & Engler Company. The other five claims, under stipulation, are to abide the result of the decision in the cases appealed.

As to all of the other claims, not appearing in these records, like stipulations have been entered into between counsel, to the effect that they shall also abide the result of the adjudications herein.

BRIEF OF ARGUMENT.

I.

At the time of the loss and damage the liability of the Receiver as a common carrier had ceased.

(a) *The cars had arrived at East St. Louis, their place of destination, as shown by the way-bills.*

(b) *The consignees also designated East St. Louis as the destination.*

Ency. of Law, Vol. II. (1st ed.) 897;
Southern Express vs. Dickson, 94 U. S., 549;
London Ry. vs. Bartlett, 7 H. & N., 400;
Mitchell vs. Ede, 11 A. & E., 888;
Foster vs. Frampton, 6 B. & C., 107;
Sweet vs. Barney, 23 N. Y., 335.

(c) *The transit had therefore ended.*

Railway vs. Mfg. Co., 16 Wall., 318;
Insurance Co. vs. St. Louis R. R., 14 Otto, 146;
Converse vs. Transportation Co., 33 Conn., 166;
Merriman vs. Railroad Co., 20 Conn., 354;
Pratt vs. Grand Trunk, 5 Otto, 43.

(d) *Unable to overthrow the fact of actual delivery to the Terminal Association, petitioners seek to avoid its effect by a technicality.*

Missouri Pacific Railway Co. vs. McFadden, 154 U. S., 155;
King vs. Lady Franklin, 8 Wall., 325.

(e) *The carrier was not required, in the usual course of business, nor expected, to remove the freight from the cars.*

(f) *No particular place of delivery was designated by the contract of carriage.*

(g) *Not only in the usual course of business, but also by special arrangement, the cars and their contents were placed on the tracks of the Terminal Railroad Association, for free storage, for the convenience of the consignees.*

(h) *Petitioners abandon the position assumed in the lower courts.*

(i) *The agreement for free storage is an established fact.*

(j) *Free storage was in fact one of the chief inducements which the Terminal offered to secure business from its competitors and to procure shipments down the east side of the Mississippi River to East St. Louis.*

(k) *When new way-bills were issued time for storage had passed.*

(l) *If the agreement to store the cars was between the Receiver and the consignees, then the Receiver was not liable.*

(m) *Such an agreement would at most make the receiver a warehouseman.*

Greg, vs. Ills. Cent. R. R., 147 Ill., 550.

II.

In the performance of the original contract of carriage, nothing remained to be done by the Receiver.

(a) *A common carrier is under no obligation to notify a consignee of the arrival of a shipment.*

Transportation Company vs. Hallock, 64 Ill., 284; and authorities there cited.
Gashweiler vs. Wabash, 83 Mo., 122.
Hotzclaw vs. Duff, 27 Mo., 395.
Cramer vs. Express Co., 56 Mo., 528.
Rankin vs. Pacific, 55 Mo., 168.
Ills. Cent. vs. Carter, 165 Ill., 570.

(b) *Consignees had notice.*

(c) *In point of fact they were always on hand to note and tally arrivals.*

(d) *The Receiver owed no duty as a common carrier to store cars and contents at East St. Louis for the convenience of the consignees.*

(e) *The duty of the Receiver to safely carry and deliver freight having ended, any custom or practice of his employes in aiding the consignee in giving directions for future transportation, was purely an accommodation to the consignee for which the Receiver was in no wise responsible.*

(f) *Goods held subject to orders are held as warehousemen.*

Railroad vs. Montgomery, 39 Ill., 335;
Railroad Co. vs. Scott, 42 Ill., 139;
Cairns vs. Robbins, 8. M. & W., 258;
Pittsburgh vs. Barrett, 3 Am. & Eng. R. R. Cases, 256;
Michigan R. R. vs. Northern R. R., 7 Mich., 515;
O'Neil vs. N. Y. Cent., 60 N. Y., 138;
Barron vs. Eldredge. 100 Mass., 455;
Nichols vs. Smith, 115 Mass., 332.
Huchinson on Carriers, § 82;
Angell on Carriers, § 134 and note.
St. Louis vs. Knight. 122 U. S., 79.

(g) *Where the consignees are accustomed to use the warehouse of the carrier, the transit ends when the goods arrive.*

Foster vs. Frampton, 6 B. & C., 107;
Scott vs. Petitt, 3 Bosanquet & Pullier, 469;
Rowe vs. Pitford, 8 Taunton, 83.
Allen vs. Gripper, 2 Compton & Jervis, 218.

(h) *By arrangement the consignees used the tracks of the Terminal Association for warehouse purposes.*

(i) *Being sued as a carrier, recovery can not be had as a warehouseman.*

St. Louis R. R. vs. Knight, 122 U. S., 79;
Railway Co. vs. Mfg. Co., 16 Wall., 318.

(j) *The execution of such an agreement for storage constituted delivery to the consignees.*

III.

The cars and contents were delivered to and accepted by the Terminal.

(a) *Pursuant to custom, the cars were set to a designated place of deposit.*

(b) *It was immaterial whether the Terminal knew the contents or fresh destination of these cars.*

(c) *Issuing of way-bill was not necessary to constitute delivery. Ill. Cent. R. R. vs. Smyser, 38 Ill., 354.*

IV.

The agreement between the Peoria Company and the Terminal Association was not a lease or contract by which that company's rails were extended into East St. Louis.

V.

The agreement between the Peoria Company and the Terminal did not make them principal and agent.

Insurance Co. vs. R. R. Co., 104 U. S., 146.

(a) *The receiver did not pay the Terminal for storing these cars.*

VI.

The same rules of law apply as well to cars as to contents.

VII.

The opinions of the majority of the Court of Appeals are not opposed to each other.

VIII.

The decision of the Court of Appeals is not in conflict with other decisions.

IX.

The original consignees are alone entitled to bring suit.

(a) *The right to possession is in the consignee.*

(b) *Where the consignor has parted with his interest in the goods and the actual owner is the consignee, the latter alone is entitled to bring suit.*

ARGUMENT.

The question presented by this controversy is as to whether or not the respondents are to be held liable for the damage occasioned by the fire in the yards of the Terminal Railroad Association of St. Louis, at East St. Louis, on the night of October 28, 1894, resulting through the gross negligence of said Association, the independent responsible agent of the consignees, and when, in point of fact, the physical possession of the property in question was in said Association, as warehouseman, either for itself as principal, or as agent for the consignees.

The case for the interveners rests largely upon the purely technical ground that no way-bills, or manifests showing the ultimate destination of the said property, had been passed on to the Association, when in fact the goods had reached their destination at East St. Louis, and the contract of the receiver to safely carry the said goods to the end of his rails, and there deliver the same, had been fully completed, the goods meanwhile being in the possession of the said Association, on an agreement between that Association and consignees, awaiting sale and a fresh destination.

In point of fact upon the arrival of the goods at East St. Louis, there were no old way-bills or manifests to be passed on to the Terminal, and for the reason that the way-bills or manifests under which the cars were carried by the receiver read "*To East St. Louis,*" and died in his hands, having been fully executed by him. It was only the *new* way-bills prepared by the consignees or under their direction on "Terminal Association" blanks, and giving a new and further destination and involving further carriage, *beyond the receiver's line* that, in any event, went to the agents of the Association.

The fundamental errors of opposing counsel are:

First: In assuming that the cars were in transit and in confusing the old way-bills, which originated with the initial carrier and which contained the information upon which each succeeding carrier forwarded the goods, with the new way-bills, the information for which originated with the consignee in his new capacity as consignor, and which information he some times sent direct to the Terminal Association, but usually through the receiver.

Opposing counsel also ignore the important fact that such way-bills were the way-bills of the Terminal Association as the initial carrier in the new haul, and were made upon its blanks irrespective of whether the information for the same came direct to it or through the receiver.

Second: In assuming, therefore, it was the receiver who was to furnish the way-bill, and by reason of not having done so that he remained liable for the loss of the goods, when, in point of fact, the information which prevented the cars from moving came from and was withheld by the consignees themselves. Whatever was done by the receiver in connection with the new way-bills was done solely as the accommodation agent of the consignees. It was the consignees, therefore, and not the receiver who alone could start, or could furnish the information which would start, the cars to the consumer under the new contract of carriage. The old way-bill being dead in the receiver's hands, as the last carrier in the line of the original contract of carriage, it follows that the receiver, neither as warehouseman nor as carrier, had any information, incident thereto, which he could have withheld or which he did withhold from the Terminal Association.

I.

At the time of the loss and damage the liability of the receiver as a common carrier had ceased.

(a) The cars had arrived at their place of destination as shown by the way-bill.

The contracts of carriage entered into with the initial carrier, the St. Paul Company, on their face show that the goods were to be moved from the point

of receipt to East St. Louis. The only evidence on this point is the way-bills which were introduced by interveners, and which in all but five instances read "Way-bill of freight forwarded from (point of receipt) to East St. Louis." These way-bills are the papers by which the cars had been moved along their entire route, and were the only instructions which the receiver had for moving the cars from Pekin. It is true that in many of these way-bills, under the head of "marks and consignee," appeared the name of some commission firm "St. Louis, Missouri." ***But this in no wise controlled the movement of the cars.*** The way-bills said that the cars must be moved from the point of receipt "*to East St. Louis.*" The words appearing under the column of "marks and consignee" simply indicated who the consignee was and where he lived. This was for the convenience of the carriers, and not instructions to them to move bulk grain to the residence of the consignee. The destination was plainly and unqualifiedly East St. Louis.

(b) The consignees also designated East St. Louis as the destination.

If, however, we are wrong in our contention that by the contract of carriage East St. Louis was the destination, and the Court can find in the contract itself, the intention of the parties otherwise expressed, that the goods were to be delivered, not at the destination named in the head of the way-bill, but at the

place of residence of the consignee indicated under the head of "marks and consignee," then we desire to call to the attention of the Court the evidence, which we contend conclusively establishes the fact that the consignees themselves named East St. Louis as the destination. If this evidence bears us out it proves one of two things: First, East St. Louis was the destination, not only by contract of carriage, but also by the intention of the parties themselves; or, Second, that the consignees exercised their right to change the destination from St. Louis to East St. Louis.

The evidence to which we refer is the stipulation of record that the consignees, Otto Teichmann, Henry Grieve, L. Lemke and Charles Orthwein, grain brokers, residing in St. Louis, would testify that the:

> "Terminal Railroad Association personally solicited this particular barley business, originating on the Chicago, Milwaukee & St. Paul Railroad, about which this controversy is pending; that these solicitations by the Terminal Railroad Association were made to all the barley dealers in St. Louis to whom the particular consignments of barley were made which are now in litigation; that the Terminal Railroad Association, as an inducement to barley dealers and shippers, agreed to hold the cars on their tracks at East St. Louis, and offered other facilities in and about their yards at East St. Louis, by which the St. Louis Terminal Railroad Association succeeded in securing the business of all the shippers; by that term I mean the consignees and shippers, except the business of the John Wall Commission Company, whose business was being handled by the Wiggins Ferry Company, a competing line with the St. Louis Terminal Railroad Association, and that, at a later day, they also secured the business of this last named firm; and that this solicitation was made in the interest of

> the Terminal Railroad Association for the express purpose of having the business sent down the east side of the Mississippi River, so as to give them the benefit of the transportation across the river at East St. Louis to St. Louis in competition with lines west of the Mississippi River." (R. pp. 238-9.)

If it can be fairly contended the original destination was St. Louis, then it cannot be denied that from the above stipulated evidence the consignees, for their own convenience, changed the destination to East St. Louis, and their right to do so only remains to be discussed. On this point, the weight of the authorities is thus summed up in *Ency. of Law, Vol. II, (1st ed.) p. 897:*

> "The right to demand a re-delivery by the carrier, or to change the original destination of freight, depends upon the ownership of the goods, and the notice to the carrier of such ownership. The rule is said to be, that where the consignor is known to the carrier to be the owner, the carrier must be understood to contract with him only for his interest, upon such terms as he dictates in regard to the delivery, and that the consignee is regarded simply as an agent selected by the consignor to receive the goods at a place indicated. Where the carrier has no notice of the ownership of the property other than that implied from the relation of the parties to each other as consignor and consignee, the latter is the implied owner, and the carrier is justified in taking his directions as to the manner of delivery."

In *Southern Express vs. Dickson, 94 U. S. 549*, this Honorable Court held that, inasmuch as evidence was introduced and the jury found the ownership was in the consignor, and that the railway company had notice of it, the railway was not justified in taking the directions of the consignee as to a change of destina-

tion, but interpreting the cases cited to sustain the right of a consignee to change the destination, the Court said:

> "The numerous cases cited by the plaintiff in error, to the effect that any delivery to the consignee which is good as between him and the carrier is good against the consignor, are cases where the carrier has no notice of the ownership of the property other than that implied from the relation of the parties to each other as consignor and consignee. This gives to the consignee the implied ownership of the property, and hence justifies the carrier in taking his direction as to the manner of delivery."

Another case which seems to be on "all fours" with the cases at bar, is *London & Northwestern Railway Company vs. Bartlett, 7 H. & N., 400,* where wheat was held at the station by order of the consignee, instead of being delivered at consignee's mill, according to the contract contained in the bill of lading. It was held that the carrier was exonerated for injury to wheat caused by delay in the station, in the absence of knowledge by it that the wheat belonged to the consignor. The Court said:

> "It is, I think, quite clear that the consignee of goods may receive the goods at any stage of the journey, and I think that if the consignor directs the goods to be delivered at a particular place, it is a contract to deliver the goods at that place and not elsewhere. The contract is to deliver the goods there unless the consignee shall require them to be delivered at some other place."

Other cases were those of *Mitchell against Ede, 11 A. & E. 888; Foster against Frampton, 6 B. & C., 107,* which are decided on similar principles. Among

the cases discussed by the Court in *Southern Express Company vs. Dickson, 94 U. S., 549,* was the case of *Sweet against Barney, 23 N. Y., 335.* where a package of money was sent by express directed to "The People's Bank, 173 Canal Street, New York, City." The package was delivered to an agent of the People's Bank at the express office, and was stolen from him. It was held that the delivery exonerated the express company from responsibility, since it had no notice that the money was not the property of the bank, the consignee.

Applying the above doctrine, the question to be determined is, did the carrier have notice that the consignor, and not the consignee, was the owner of the goods? No! There is no conflict in the evidence. The intervening petitioners themselves testified that they in no way notified the carrier that they were the owners of the goods. (R pp. 293, 297, 303, 310, 314. 318.)

The evidence of the consignees above, on stipulation, as to free storage by the Terminal Association, is fully confirmed, as will presently be seen, by that of other witnesses who were sworn in the cause in behalf of the receiver, and closely cross-examined.

The practical effect of such evidence is to strongly and conclusively establish an agreement between the consignees, either as owners, or as agents of the own-

ers, and the Terminal Association, by which the latter was to act as warehouseman, in taking and storing the goods of the former upon their arrival and deposit on the tracks of the latter at East St. Louis.

The reasonable presumption that also arises upon the face of such evidence is that the duty of the receiver, as a common carrier, had been fully performed when the cars and their contents had been hauled to the end of the receiver's rails, and set to the designated "Y" tracks of the Terminal Association at East St. Louis, subject to the full control of the consignee.

Setting the cars thus to the designated "Y's" was delivery to the consignees or their agents, the Terminal Association, just as much as if the cars had been set to or unloaded in a previously designated warehouse.

Such evidence also shows the motive and consideration influencing the Terminal Association to store the cars on its tracks at East St. Louis, free of charge, *to be the tolls arising from the control of future transportation*, upon reassignment to a fresh destination, either to the purchasing breweries across the river in St. Louis, or the various brewers on the east bank of the river.

And these propositions are all consistent and fall into line with the dominant fact, clearly shown in the record, that the barley was either bought by the said

grain brokers, the consignees, for re-sale, or was consigned to them for sale for account of the owners and consignors, and for their convenience, and to save storage and expense or re-loading, was to be held in the original cars, on the tracks of the Association in its yards in East St. Louis, *awaiting market*, and when re-sold and properly re-consigned was to be sent forward by the Association in the same cars, under new way bills, to the consumer.' And with the further fact, stated above, that East St. Louis was the "port of entry" and resale for that class of goods for St. Louis and adjacent territory.

(c) The transit under the original contract of carriage had therefore ended.

The remarks of Justice Davis, *Railway vs. Mfg. Co., 16 Wallace, 318*, relied upon by opposing counsel, were made in reference to goods *in transit*, where, as incidental to the delivery to a connecting carrier, storage was necessary. They have no application to a case where the goods had arrived at their final destination, and had been turned over to a warehouseman ready to be delivered to the consignee, or subject to his full control, to await, at his pleasure, resale, distribution and a new contract of carriage. In fact, this very distinction is made by Mr. Justice Davis, when he says:

> "It is *argued*, however, that there is no difference between goods to be delivered to their owner at their final

destination, and goods deliverable to the owner or his agent for further carriage; that in both cases, as soon as they are 'ready to be delivered' they are 'awaiting delivery.' This position, although plausible, is not sound. There is a clear distinction in our opinion between property *in a situation to be delivered over to the consignee on demand*, and property *on its way to a distant point*, to be taken thence by a connecting carrier. In the *former* case it may be said to be *awaiting delivery;* in the *latter* case, *awaiting transportation.*"

The phrase "awaiting transportation" has reference to the delay at some *intermediate* point of the *original* contract of carriage, and not, as in this case, to storage, for the benefit of the consignee, at the *destination* named on the original way-bill and while awaiting distribution and a *new* transportation under a new contract of carriage.

That the consignee, instead of unloading the grain as he might have done, preferred to sell it in bulk and then reconsign and reship it in the same car to the purchasing consumer, does not in the least change the fact that the cars, in these cases, were subject to the full control of the consignee, and that they were neither "awaiting delivery" nor "awaiting transportation," but were "awaiting market" and from the moment of their deposit in the place designated and required by him in the usual course of his business, delivery as well as carriage was complete.

It will be found that all the cases cited by opposing counsel on this point have reference to goods at an *intermediate* point of the original carriage, and not to goods which have arriven at their *destination.*

It is said to be sometimes a matter of nicety to decide whether the bailee is acting in the capacity of forwarder or carrier and in what character he may be chargeable with loss. ***Teall vs. Sears*** *(9 Barb. N. Y. 317)*. Opposing counsel have failed to grasp or observe the distinction. The rule applicable to the circumstances of this case is well and clearly stated in ***Ladue vs. Griffith***, *25 New York 36*:

> "When a person is both carrier and warehouseman, it is well settled that if the deposit of the goods in the warehouse is a mere accessory to the carriage, and not subject to any particular order of the owner, or if they are deposited for the purpose of being carried further, the responsibility of the party having them in charge is that of a carrier: *Angell on Carriers, Sec. 133; and Blossom vs. Griffin, 13 N. Y. 569, 572*). But when goods are deposited in a warehouse subject to the further order of the owner, the case is otherwise. In such case, as Judge Buller said, in *Garside vs. Proprietors of Trent and Mersey Navigation Company, 4 Term Rep. 581:* 'The keeping of the goods in the warehouse is not for the convenience of the carrier, but of the owner of the goods. In such case, the rights and duties and responsibilities of warehousemen would attach to the person having the goods in store.'"

> See also *Platt vs. Hibbard 7 Cowen (N. Y.) 499.*
> *Northern Indiana R. C. vs. Shurtz, 7 Mich .525.*
> *Montgomery vs. R. R., 339 Ill. 335.*

The way bills introduced in evidence *by the petitioners*, show conclusively that the original contract of carriage was from points of receipt on the line of the initial carrier to East St. Louis, with the exception of five cars numbered 46064, 10071, 34908, 10536 and 3218, which show "Lake City to St, Louis." (R. p. 247).

That this absolutely controlled the movements of cars and established beyond question that their destination was East St. Louis, as therein indicated, is shown on the cross-examination of petitioners' own witness, W. E. Beacham. (R. p. 131).

> Q. "Taking this car No. 68, about which you have been questioned, I will ask you upon which of these papers the C., P. & St. St. L. or Jacksonville & Southeastern Railway would handle the car at East St. Louis or at the destination?
>
> A. "Car 68 would be handled on this paper, which is a way-bill.
>
> Q. "Now I will ask you to look at that way-bill and name *point of delivery and the destination;* the point of receipt and destination of that car, reading from the way-bill itself?
>
> A. "This is a way-bill reading from Wykoff, Minnesota, *to East St. Louis.*"

Again, their leading and by far their most important witness is George W. Phelps, the agent of the Terminal Association at East St. Louis, whose testimony shows throughout the greatest zeal in aiding the counsel for the petitioners in the effort to shift the burden of liability from the Association to the receiver. On this same point, it is important to note that his testimony is in exact accord with that of Beacham, quoted above. On cross-examination, he testified as follows:

> Q. "I will ask you whether in point of fact that way-bill does not also show the initial point at Wycoff, Minnesota, and terminal point at East St. Louis?
>
> A. "The way-bill is headed East St. Louis; yes, sir.

Q. "What is that for? What does it mean?

A. "That way-bill?

Q. "Yes, sir."

A. "*Instruction to carry the car to EAST ST. LOUIS over those lines.*" (R. p. 136.)

East St. Louis being the end of the transit, none of these original way-bills were ever passed on to the Terminal Association; but the bills referred to as going to the Association were, in every case, the entirely *new* bills creating a new contract of carriage, showing East St. Louis as the point of origin, and some other point as the new destination. Not only this, but the way-bills referred to as *going to* the Association, were *actually Terminal Association way-bills*; filled in on Terminal Association blanks, and showing the new carriage from a point on the Terminal Association rails. And as to which the receiver sometimes acted simply as the accommodation agent of the original consignee; and not either as carrier or warehouseman. (R. pp. 132-136, 211-222; Exhibit "L" 140.)

In addition to this positive evidence, we find the further fact that the initial carrier, the St. Paul Company issued through its way-bill, and indicated thereon the various carriers which it was intended should handle the shipment, namely the "R. I. & P. and J. S-E," the latter being the name by which the Peoria Company was commonly known. East St. Louis, besides being the storage and distributing point for the barley, is the

terminus of the Peoria Company, and if it was originally intended to have the shipments carried through to St. Louis, the Terminal Association would have appeared on the way-bill as the last connecting carrier. (R. p. 253.)

As the Supreme Court of the United States says in *St. Louis Ins. Co. vs. St. Louis R. R., 14 Otto, 146:*

> "that in the absence of an express contract, each connecting carrier only undertakes to haul to the end of his rails."

East St. Louis was the end of the Receiver's rails, and was the destination in the way-bill which came along with the cars. No connecting carrier was indicated in that way-bill to which the receiver was to deliver the cars *as a connecting carrier*, and everything points to the fact that East St. Louis was the destination on this original contract of carriage. When delivery was made to the Terminal, it was as a warehouseman to hold the goods for the convenience of and subject to the orders of the consignees.

It is claimed that the station receipts offered in evidence by the petitioners contain under the head of "marks and consignees," *not under the head of "destination,"* the name of the commission broker, with the words "St. Louis." In addition to the reply we will hereafter make to this, we desire to call the Court's attention to the fact that petitioners admit these station receipts were not

issued at the time of the shipment of the goods, but were executed *after the loss.* If they can be said to differ from the way-bills in the particular as to the point of destination, which is entitled to the greater weight? Opposing counsel admit that petitioners procured those receipts *after* the fire *for the purpose of presenting their claims.* (Brief, pp. 56–7). The way-bills were issued at the time of the shipments, and are contemporaneous with them. Surely the latter are the better evidence of what the contracts were, viz: *to transport the grain to East St. Louis.*

If East St. Louis was the destination, the transit had ended, and whoever held the cars and contents, held them at the most as a warehouseman.

Whether St. Louis or East St. Louis was the destination, the record shows conclusively that the "Ys" of the Terminal Association were the designated place of deposit for this class of freight. We submit, therefore, that if East St. Louis was the destination, the freight had been delivered to the Association as the agent of the consignee; and if St. Louis was the destination, the cars had been delivered to the Association as the next succeeding connecting carrier, by the placing of the cars at the designated place of deposit.

W. H. Calvert testifies in behalf of the Receiver (R. p. 207):

> Q. "As the cars came over the C., P. & St. L., I will ask where the deposit is, or was, so far as the engine is concerned, and the immediate control of those cars by the engine?
>
> "A. "On these 'Ys' that come right round here.
>
> * * * * * * * * *
>
> Q. "I will ask you if those 'Ys' *are the designated place of deposit* as between the Terminal Railroad Association and the C., P. & St. L?
>
> A. "Yes, sir; that is as far as our trains go."

Again, at page 211, we find this testimony:

> Q. "I understood you to say the place of deposit of cars coming in was on these 'Ys' you have marked?
>
> A. "*So far as we are concerned;* the C., P. & St. L.
>
> Q. "After the consignee had been heard from, either directly to you or through Roederer, or any other agent of the Terminal Association, or whatever source, did the C., P. & St. L. Company ever tie on to them again?
>
> A. "No, sir.
>
> Q "Did you, as chief agent of the receiver at East St. Louis, have any control or direction as to the particular track in the yard of the Terminal Association upon which the cars were to be deposited and placed?
>
> A. "No, sir.
>
> Q. "*Who directed that and controlled it?*
>
> A. "*The Terminal Railroad Association.*"

The receiver also swears that the "Ys" were the designated place of deposit (R. p. 222):

> A. "That is the place where all of our deliveries were made to the Terminal Association; our engine would pull the train into these 'Ys' and their switch engine would take it from there.

Q "Who had the care, custody and control after you delivered them on these 'Ys'?

A. "The St. Louis Terminal Association, unquestionably."

The foregoing evidence is consistent with and is strongly supported by the testimony of George H. Phelps, local agent at East St Louis for the Terminal Association, and the principal witness for the interveners (R. p. 74).

Q. "The train comes in on this 'Y'; what is then done with it by the receiver, if anything?

A. "The train stops on the 'Y' and the receiver is done with them."

See also (R pp. 184, 185, 188, 189).

In *Converse vs. Transportation Company, 33 Conn., 166*, a railroad company and a steamboat had a covered wharf in common, at their common terminus, used as a depot and a wharf; and it was the established usage of the steamboat company to land goods for the railroad. on the arrival of its boats in the night, at a particular place in the depot, whence they were taken by the railroad company, *at its convenience*, for further transportation, both companies having equal possession of the depot. There was no evidence of an *actual* agreement that the cars deposited were in the possession of the railroad company, and the goods in question had not been in the *manual* possession of the railroad company, when they were destroyed by fire on the Sunday afternoon following

their deposit on the previous night. It was held in that case that there was a tacit understanding that the steamboat company should deposit their freight at that particular spot, and that the railroad company should take it thence at their convenience. *The delivery to the succeeding carrier was held to be complete*, and a recovery against the first carrier for the loss of the goods was reversed.

In *Merriam vs. Railroad Company, 20 Conn., 354*, it was held that if a common carrier agreed that property intended for transportation by him may be deposited at a particular place without express notice to him, *such deposit alone is a sufficient delivery*, and that such an agreement *may be shown by a constant practice and usage so to receive property without special notice.*

Both of the foregoing cases are approved as authority by the Supreme Court of the United States, in the case of *Pratt vs. Grand Trunk, 95 U. S., 43.* See also: *Truax vs. Phila. R. Co., 3 Houst (Del.) 251.*

(d) **Unable to contradict the fact of actual delivery to the Terminal Association, petitioners seek to avoid its effect by a technicality.**

There seems to be no question of the fact that, at the time of the fire, the Terminal Association had the exclusive *actual physical* possession, custody and control,

but to avoid this, opposing counsel rely on a pure technicality, namely, that there had been no delivery of a way-bill. The delivery of a way-bill would simply constitute a *constructive* delivery of the cars, as between the two carriers, a formality which could in no way concern a third party, who would have the right under the contracts of carriage in this case, to sue the carrier having the *actual* custody.

Elsewhere herein we show that the issuing of a way-bill is not necessary to constitute a delivery, that it is simply evidence of the same; and that an actual delivery may be shown by other competent evidence.

Opposing counsel insist that the receiver testified:

> "That, until the Terminal Company got the way-bills, it would not move the car, and that the car would be held until it received the way-bill, *or got instructions* from the receiver's agent; and that until a way-bill was delivered *or instructions given*, the car was subject to his orders."

We do not believe it was the intention of counsel to misquote the testimony, but the record shows that the receiver testified directly to the contrary:

> A. "I don't understand we had any control over them; *if it suited their* (the Terminal) *convenience to move them into the other corner of the yard they would have done so.*" (R. p. 228.)

So much as to moving the cars by the Terminal Association, while they were in storage. When the grain had been sold on the market, and the original consignees were ready to give the grain a fresh des-

tination, of course it was necessary for the Terminal Company to have "instructions," which often came direct from the consignee to the Terminal, but usually through the receiver, acting as the accommodation agent for the new consignor.

> Q. "Wouldn't have moved them to their *destination* until they got a way-bill?
>
> A. "Not till they got *instructions*?
>
> Q. "They would still be held there?
>
> A. "Yes, sir.
>
> Q. "So they were subject to your order to that extent?
>
> A. "Yes, sir." (R. pp. 228; 135-136.

So it is to be plainly seen that during the period the cars were in storage awaiting sale and fresh destination, the Terminal had exclusvie physical and actual custody as to that storage, and it was only as to a fresh destination that instructions were to be given. During the period of storage the Terminal acted as a warehouseman. The moment it received "instructions" as to the fresh destination, it entered upon the performance of the duties of a common carrier. We submit that this is the only fair interpretation of the testimony.

In this connection it must always be borne in mind that the instructions came from the original consignees, and were to be inserted in the blank way-bills—not of the Peoria Company, *but of the Terminal Association.*

Opposing counsel are compelled to ignore entirely the fact that these cars were received by the Terminal Company in behalf of the consignees for the purpose of storing them at East St. Louis for re-sale, and base their argument that a bill of lading or way-bill is necessary to constitute a delivery, on the theory that the cars were *in transit*, and were not to remain at East St. Louis, subject to the control of and until the original consignee had made a sale, and was ready to enter into a new contract of carriage and give the Terminal "instructions" as to the new or fresh destination. (R p. 135.) It was entirely at the option of the consignor whether the cars should be unloaded at East St. Louis or be re-billed elsewhere. No right of initiative or control whatever remained in or was vested in the receiver.

We find that opposing counsel have attempted to argue the actual possession of the cars as being in the receiver, on the theory that they were in his portion of the Terminal yard at the time of the fire. This is almost as strained as the ***constructive*** delivery by way-bill. This theory, that the receiver had possession of a portion of the Terminal yards, is supposed to have its origin in the contract between the Peoria Company and the Terminal, which provided that the latter should furnish the necessary yard room and track facilities in their yards at East St. Louis. (R. p. 100.) But what for? For the Terminal to carry out an

agreement *it* had entered into with these consignees to store their grain? Not by any means, but as the contract recites, to "properly take care of and handle the business of the *party of the second part*, viz: the Peoria Company. This contract was not to enable the Terminal to handle *its* business The record clearly shows that the storage of this grain was the Terminals, business, in order to secure control of future transportation, and no concern of the receiver after the cars had been "set to" the Terminal's tracks.

Mr. Phelps, a representative of the Terminal, makes this very plain, when he testified (R. p. 79):

> Q. "Was the service rendered by the Terminal Association, in breaking up the train of the receiver when it came in on the 'Y,' and placing the cars on these tracks marked red, a *separate and distinct service* from the work you did after receiving the way-bills?
>
> A. "*It was a separate and distinct service.*
>
> Q. "Explain how and why.
>
> A. "We received for this service, *taking care of the cars*, for which we had a way-bill a *separate revenue.*
>
> Q. Separate from what?
>
> A. "*From making and breaking up trains.*"

Can there be any question, then, that this "separate and distinct service" of "taking care of the cars" for which the Terminal received a "separate revenue" was being rendered pursuant to the agreement with the consignees to hold and store their cars until they should name a fresh destination?

That this storage was part of the business of the Terminal, and one of the great inducements it held out for the purpose of procuring the "initial haul" on re-sale and re-consignment, is conclusively established by the testimony we discuss hereafter in this brief.

It was also attempted to be shown on the trial, that the tracks upon which these cars were, at the time of the fire, had been allotted to the receiver. This wholly failed. Mr. Stapleton, agent for the receiver, tesfified (R p. 183):

> Q. "Now as to the cars stored on the tracks, were there any other cars or property than that of the C., P. & St. L. upon the tracks next to the warehouse?
>
> A. "Yes, sir.
>
> Q. "How were the tracks used; exclusively for the business of the C., P. & St. L.?
>
> A. "No, no; never has been so.
>
> Q. "Who used them?
>
> A. "The Terminal Association used them and we used them; in fact, we never had any rights.
>
> Q. "Did you have any control or direction as chief clerk in the office (of the receiver) as to the particular place of deposit of cars brought in by the C., P. & St. L.?
>
> A. "No, sir.
>
> Q. "Did anybody in your office?
>
> A. "No, sir.
>
> Q. "Who managed as to place of deposit?
>
> A. "The Terminal Association.
>
> *Cross-Examination.* (R. p. 187).
>
> Q. "These tracks, I understand, in the immediate vicinity of the warehouse, were not exclusively used by the C., P. & St. L. trains?

A. "No, sir.

Q. "But commonly for setting cars in there?

A. "*Just as the Terminal Association saw fit;* put our cars there if they saw fit."

John Weidmer, of the Gratiot Street Warehouse Company, testified that he rented of the Terminal Association a warehouse which was right in the middle of that part of the Terminal's yards, which opposing counsel refer to in their brief as the receiver's "portion" of these yards; that some of the tracks ran through the warehouse; and that he rented from the Terminal on the understanding that it had full control. (R. pp. 195, 196, 197).

The utter absence of any such control of tracks or yard or any portion thereof is also fully shown in Judge Showalter's opinion, hereafter quoted.

Opposing counsel make the same argument in reference to "junction reports" as to the delivery of a way-bill. Our reply also is the same. Junction reports are used by carriers to notify the owners of cars that they have passed from one carrier to another. They do not constitute delivery, and if delivery was actually made, a failure to send a junction report can not operate to *draw the car back.*

To show how utterly immaterial this act of delivering a way-bill or sending a junction report is to the actual delivery of the cars, let us place the "shoe on the other foot," and ask the question: "If there

had been a new way-bill issued but no actual physical delivery of the cars, would this Court hold the party to whom the way-bill had been issued responsible for the care, custody and control of the cars?" The answer to this is found in *Missouri Pacific vs. McFadden, 154 U. S., 155*, where this Court said:

> "All of these allegations in the answer were, of course, admitted by the exception, and, therefore, the case presents the simple question of whether the carrier is liable on a bill of lading for property which, at the time of signing of the bill, remained in the hands of the shipper for the purpose of being compressed for the shipper's account, and was destroyed by fire before the delivery to the carrier had been consummated. The elementary rule is that the liability of a common carrier depends upon the delivery to him of the goods which he is to carry."

Continuing further, the Court, quoting from *King vs. The Lady Franklin, 8 Wall, 325*, speaking of a bill of lading, says:

> "It is an instrument of a two-fold character. It is at once a receipt and a contract. In the former character it is an acknowledgement of the receipt of property on board his vessel by the owner of the vessel. In the latter it is a contract to carry safely and deliver. *The receipt of the goods* lies at the foundation of the contract to carry and deliver. If no goods are *actually* received, there can be no valid contract to carry and deliver."

And continuing, the Court thus characterizes that rule:

> "The rule thus stated is the elementary commercial rule. Indeed, in the case last cited, the Court expressed surprise that the question should be raised. This view coincides with the rulings of the English courts."

See also: *Lake Shore vs. Live Stock Bank, 178 Ills., 518;*
California vs. Compress Co., 133 U. S., 387;
St. Louis Co. vs. Ins. Co., 139 U. S., 223.

(e) The carrier was not required, in the usual course of business, nor expected, to remove the freight from the cars.

The evidence on this point is clear that it was the custom established by these very consignees, for their own benefit, to permit these barley shipments to stand in the yards of the Terminal Association at East St. Louis, from two hours to four weeks or more. The reason for this was plain. The consignees were brokers; they were not consumers. They acquired the grain to resell. If the grain arrived before they had made a re-sale, or if the "market" did not suit them, it was necessary to store it some place, and by arrangement with the Terminal, by which the latter made sure of its "bridge toll" or "initial haul, a place of free storage was designated on its tracks in its yards in East St. Louis as a convenient distributing point to consumers on both sides of the river. It would have been not only inconvenient for the consignees to remove the grain from the cars, but would have also caused great and unnecessary expense and delay, inasmuch as they themselves had no perfect control over the date of reshipping the barley, as that depended on the state of the "market." So it was greatly to their advantage to keep the grain in the cars ready to receive a fresh destination at the very moment they could make a sale. The evidence which establishes this custom, and which is uncontro-

verted, is found in the testimony of W. H. Calvert, the agent of the receiver at East St. Louis, which we quote (R. p. 231, 232), and which shows that this custom has existed since the winter or early spring of 1891.

> Q. "You stated yesterday in the course of your examination as to these barley shipments coming to us over the Chicago, Milwaukee & St. Paul railway, and probably as to certain other classes of property, the shipments in question were permitted to stand in the yard at East St. Louis, all the way from two hours up to four weeks or more. I will ask you to explain how this happened.
>
> A. "Well, the class of freight allowed to stand there consists of grain (barley in particular) hard coal, pig iron and salt, and other commodities that are held on what we term the market; in other words forwarded there (not in all cases, but as a rule) and held for the accommodation of the consignee; which is virtually for the interest of the shipper; the barley being held on commission to await an advance in the market. In other words, it comes in there, and if the market is all right when it arrives they sell it immediately, but as a rule hold it until the market suits them. *It is, in other words, a port of entry for that class of goods at St. Louis.*
>
> Q. "And is held to await the state of the market for the accommodation of the consignee?
>
> A. "For the accommodation of the consignee, which is virtually accommodation to the owner, it being handled on commission.
>
> Q. "How long has this barley business been carried on, and how long had that custom of shipment been in operation at St. Louis?
>
> A. "Well, since the C., P. & St. L. opened business in East St. Louis, which was in the winter or early December or January, 1891."

We also refer to the testimony of the same witness at R. pp. 210-11.

In further corroboration we quote also from the testimony of E. R. Stapleton, Chief Clerk of Calvert, as follows: (R. p. 189).

Q. "Do you mean to say that the receiver had control of these cars so far as placing them is concerned, or handling them?

A. "So far as placing them or handling them he did not.

Q. "Now, I will ask you whether cars billed, say from Wykoff, wherever that may be, to East St. Louis, with a memorandum on the face of the way-bill which stated the name of the consignee in St. Louis, whether the C., P. & St. L., when it delivered the cars at these yards in East St. Louis, had hauled them as far as they contracted to haul them?

(Objection.)

A. "They had. The destination of St. Louis on the bill cuts no figure in the matter whatever; the cars are brought in there and held, and the consignee is served with a regular notice.

Q. "Then it is the consignee directs?

A. "The consignee directs where he wants them; a large portion go to Belleville or Highland or Hines Brewery—to different places.

Q. I will ask you whether or not the way-bill as to barley shipped on which you had had the name of the consignee in St. Louis, was conclusive as to the ultimate destination of the car?

A. The barley shipment? By no means, whatever.

Q. What became of it after placing it on the 'Y'?

A. It would be hard to answer that question, because it goes to a thousand different places.

Mr. Hanson: In St. Louis?

A. St. Louis and East St. Louis both: no general place.

Q. Is this barley, any of the barley received from the C., M. & St. P. prior to the date of the fire, and about which he has offered some memorandum way-bills and so forth shipped to other points—East St. Louis?

A. Prior to the fire?

Q. I speak of prior to the fire.

A. Oh, yes.

Q. Who controlled as to the precise and definite point where it should be delivered?

A. The consignee in all cases.

Q. Then I will ask you what the custom was as between the C., P. & St L. and the Terminal Railroad Association as to the further direction and final destination of the cars.

A. The cars would come in and be placed on the tracks in the Terminal Association yard wherever they saw fit; we would take the way-bill and notify the consignee that we had a car numbered so and so and loaded barley, 'where do you want it?' That is about the substance of the notice. And at such time as he got ready he would send this notice back, endorsed on the back, a great many times, send this car to Hines' Brewery or send it to Highland or some other point. Then we take and make out a way-bill; take that to Mr. Phelps and take his receipt.

Q. Was that a different and separate transaction having reference to the original contract between the shipper and the C., M. & St. P.; was it a new arrangement the consignee directed and controlled, or was it the original arrangement named by the shipper?

A. A new arrangement by the consignee, who placed orders with us to hold his barley." (See also R. pp. 183-184.

Also the receiver, C. H. Bosworth: (R. P. 221.)

Q. "As receiver, I will ask you to state between what points you undertook to haul that barley, and between what points you were paid?

A. Peoria and East St. Louis.

Q. What point in East St. Louis?

A. It is difficult for me to state that. I should say in answer to that question that we can't haul it further than the end of our rails.

Q. Where is the end of your rails?

A. At the bridge junction, unless the stuff was expected to be delivered at our freight house or the yard tracks in connection, when it would be delivered to the Terminal Association.

A. I refer you to a certain blue print offered on behalf of the petitioners and call your attention to three certain 'Y' tracks, upon which it appears from the statement of Mr. Calvert, Mr. Phelps and others, these C., M. & St. P. and other cars hauled by you to East St. Louis were delivered, and ask you whether or not you exercised any right of control as a common carrier beyond these three 'Y's?'

A. That is the place where all of our deliveries were made to the Terminal Association, our engine would pull the train into those 'Y's' and their switch engine would take it from there.

Q. Who had the care, custody and control after you delivered them on these three 'Y's?'

A. The St. Louis Terminal Association, unquestionably.

Mr. Hanson: That is, that is your legal opinion?

A. No; they actually had the cars and custody of the cars; we had no agents to attend to the movement of them, or no engines.

Q. What did the bills of lading say?

A. From Wykoff to East St. Louis with the name of the consignee in St. Louis.

A. I should say that without any special understanding or knowledge about the business, our agent would have naturally taken the cars or had them eventually brought on the transfer tracks, which would be near our freight house in East St. Louis. It was known in all these cases the cars were subject to movement by rail by some railroad company and put in this yard convenient for that additional movement.

Q. Was that seperate and distinct, or was it a part of the original contract by which you undertook the freight?

A. I should say not a part of the original contract; the contract provided for the transportation to East St. Louis. We have fulfilled that part of it, and we had discharged our obligation."

Also Henry Rippe, one of the interveners (R p. 305.)

Q. "Upon receipt of this letter did you instruct your agent not to allow the shipments to be held in East St. Louis?

A. I do not think I did.

Q. What did you do upon receipt of the notice contained in this, to-wit: 'All your shipments come via J. S-E. R. R. into East St. Louis and are held there until disposition is given them, and they pay the transfer,' in regard to instructing your agent?

A. I don't think I wrote them anything; I left it to their mode of doing business; I could not tell them what to do down there.

Q. You allowed them to handle that end of the business?

A. Yes, sir."

That the storage of the cars was for the convenience of the consignees and was accessory to re-sale and future transportation and not to the original contract of carriage, conclusively appears, as we think, from the long period the cars were permitted to stand on the tracks in the Terminal yards. Twenty-four hours is the customary and usual limit of storage accessory to and while "awaiting delivery," and even shorter periods for delays at intermediate points, when "awaiting transportation," incident to through contracts of carriage.

But the delays in the Terminal yards at East St Louis were absolutely inconsistent with either theory.

The cars mentioned in schedule "C" (R. p. 102) remained from one to seven weeks; two of the cars from about September 22d to November 1st, and out of twenty-six on the list eleven of them remained for an average of one month. The cars in controversy, Exhibit 6, as found by Judge Woods in the opinion of the Court of Appeals (R. p. 342) had been on the tracks of the Terminal Association at the time of the fire (October 28th, 1894) which destroyed them, "one since the 28th day of September preceding," one for a period of eighteen days, and the others for periods ranging down from eighteen days to seven hours. Each and all of them subject not only to the careful notation on the records of the Terminal showing the exact hour of delivery, but subject likewise, to the daily inspection and tally of the consignees through their inspecting agents, in order to verify contents and to obtain "samples" for the purpose of re-sale on the "market." During this storage the cars were subject to the control and disposal of the consignees, and were in the exclusive custody of the Terminal.

(f) No particular place of delivery was designated by the contract of carriage.

This must be conceded in any view that is taken of this case. It makes no difference whether the des-

tination was St. Louis or East St. Louis. There is nothing in the way-bills to indicate what place in St. Louis or East St. Louis delivery was to be made. By the way-bills the freight was to be forwarded from a certain point to East St Louis, and the name of the consignee and his residence, "St. Louis, Mo.." was also noted therein. The only other evidence of the contract of carriage is the delivery of the goods to the carrier, and the shipping receipt, which were given to the shippers after the loss occurred. As to place of destination, the shippers' receipt will be found as indefinite as the way-bills, as they name only the consignee and the city in which he resides, without anything as to the particular point in the city where the goods are to be delivered.

There is nothing surprising in this. The absence of a designated place of delivery in the contract of carriage is not the result of negligence or mistake, but from the very nature of the shipments it was the intention of the parties not to designate a place of delivery. The consignees were grain brokers. Their business was buying and selling, not consuming. It would not be reasonable, therefore, to presume that it was the intention of the parties to have bulk barley delivered at the place of business of the consignees. Especially in view of the fact, fully disclosed in the evidence, that the consignee, after re-sale, and as necessary, directed re-shipment and delivery to Heinz's

brewery, East St. Louis, or to Highland, or to Belleville, Illinois, or to the St. Louis breweries, for all of which places East St. Louis was the designated "port of entry."

None of them were on the receiver's line. Nor near it—not even Heinz brewery in East St. Louis. Highland was thirty miles out on the Vandalia railroad, Belleville fourteen miles out in St. Clair county, and the malthouses, in St. Louis, across the river in another state, miles away from the end of the receiver's rails, involving, in every instance, further transportation under a new contract.

(g) **Not only in the usual course of business, but also by special arrangement, the cars and their contents were placed on the tracks of the Terminal Railroad Association for the convenience of the consignees.**

That there was, in fact, an arrangement between the Terminal Railroad Association and the consignees to hold this grain in the cars on the tracks of the Terminal at East St. Louis, we have shown above by a reference to the stipulation of facts entered into and of record. And that these cars and their contents were held on the tracks of the Terminal for the convenience of the consignees, we have shown by a reference to the uncontradicted evidence of W. H. Calvert, his chief clerk, Stapleton, and by the letter of Orthwein to Rippe. Exhibit "G" (R. p. 308).

In the Court of Appeals, opposing counsel did not deny the existence of this agreement, but after having stipulated that the consignees would swear to it, sought to annul its effect by argument. They presented "three complete answers" to it. We quote from their brief therein filed:

> 1. "This barley was all consigned to either the Teichman Commission Company, St. Louis, or the Orthwein Grain Company, St. Louis, by way of East St. Louis. This is made certain by the stipulation between the parties of August 27, 1895, hereinbefore referred to: and had the witnesses been present and testified as stated by the counsel, their testimony would not have changed the effect of this stipulation, as to the destination of the barley."

We submit that the testimony of these witnesses does not change the effect of the stipulation referred to, since, as we have heretofore said, there is a radical difference between the person to whom a shipment may be "*consigned*" and the place to which it is *destined*. But if it be admitted that the original destination was St. Louis, these witnesses were the consignees and *had the right to change the destination to East St. Louis, and did so.*

The second "complete answer" was:

> 2. "The consignees of the barley in question had no authority to bind the shippers, who were the owners, to any such arrangement."

This is a statement of law for which no authority is cited, nor can any be found. On the contrary, the law is well settled that the consignees had the un-

doubted authority to make the arrangement by which the destination was changed to East St. Louis, and the cars there held for a fresh contract of carriage.

(This brief *ante*, for authorities).

Not only is this second answer without foundation in law, but it is also utterly without foundation in fact, as will appear from the testimony of one of the shippers, Mr. Rippe, quoted above, to the effect that the method of handling this barley business at East St. Louis was left entirely to the consignees.

The third "complete answer" of opposing counsel was so complete that it answered itself. They argued that:

> 3. "until there had been a delivery * to the Terminal, it could not hold possession of it for the consignees. This is made clear from the testimony of Mr. Stapleton * * from which it appears that the custom was for him to notify the consignees of the arrival of the barley and ask them where they wanted it, *and upon* receiving this information, he would then make out a way-bill, deliver it to the agent of the Terminal and take his receipt."

It is well settled, however, that a carrier is under no obligation to notify a consignee of the arrival of the goods and if the consignee does not appear to accept them the carrier may place them in storage at the consignee's expense and risk. With this in view, the question naturally arises, what was done with the goods between their arrival at East St. Louis and the

issuing of the new way-bill upon the order of the consignee. The reply is found in opposing counsel's "third complete answer," where they stated that:

> "until the consignees knew that the barley had arrived at East St. Louis, and the same had been delivered to the Terminal Association, they could not and would not give that company further orders for re-shipment."

Thus showing conclusively that even opposing counsel recognize that it was customary to *make a delivery* to the Terminal, and *after* such delivery had been made for storage, to notify the consignees, and then take their instructions for a *new contract of carriage* to a *fresh destination*. Is it not a little significant that these instructions, or "further orders for re-shipment," *were often sent direct to the Terminal?* (R. pp. 192-3.) But never until the property had been re-sold; and new shipping orders were always incident to and dependent on such re-sale, and not at all on the receipt of notice of arrival from the receiver.

These notices, then, amounted to nothing more than advising the consignees that their barley was in storage with the Terminal, awaiting their convenience for a sale and fresh destination? Was the receiver under any legal obligation as a common carrier, to send them? Surely not. The sending of these notices did not deliver the cars, and if the cars had actually been delivered, the *Terminal Railroad should not be permitted to escape liability for their care*, simply

because the receiver had not continued to advise the consignees that their goods were where they had arranged to store them. However, the testimony shows that it was the custom to notify these consignees, (R. p. 190-1) and the presumption follows that they were notified. *Hempstead vs. New York Central, 28 Barb. 485.*

On this point, the finding of facts by the Court of Appeals, as stated in its opinion, is most persuasive, if not conclusive:

> "It is not reported (by the Master) that the consignee of any car was not notified by the Receiver, and did not otherwise have knowledge before the fire that the car had arrived and was upon the Terminal tracks, subject to his order. On the contrary, the proof is that the consignees received from the shippers immediate notice by mail of each consignment and, in addition, received a sample of the grain, which, according to the (Master's) report, the shippers were accustomed to send by express. Informed in this way of the number and contents of a car in transit, the agent of the consignee, in regular and daily attendance in the yards for that purpose, was able to take and, there being no evidence to the contrary, presumably did take, the required sample from each car promptly upon arrival. This conclusion is fortified by a letter of the Orthwein Grain Company to one of the interveners, in which it is said: 'two of your cars (giving the numbers) arrived this afternoon,' and by the testimony of Rau to the effect that his consignee had possession of samples of his grain taken from the cars on the day of their arrival at East St. Louis. The proof, in addition to the facts stated, being that notice of the arrival of cars was regularly and promptly sent to the consignees by the employes of the receiver, the fair inference in the absence of contrary evidence is that notices of the arrival of the cars in question were sent and were duly received by the consignees." (R. p. 344).

We add, if they had not been, opposing counsel would have had them so testify.

(h) Petitioners abandon the position assumed in the lower courts.

Abandoning the argument by which they attempted, in the lower courts, to nullify this agreement between the consignees and the Terminal, they now take a new position, viz: that at the time the testimony was admitted they

> "had no thought, and not until it was argued in opposing counsel's brief on these appeals *did it ever occur to us*, that it could or would be *contended* that this informal stipulation, made in the hurry of and for the purpose of expediting a hearing, would or could be construed in such a manner as to cover cars while they were yet standing and being held on tracks used by the receiver, under his agreement with that Association, and when they had not been way-billed to that Association, and it did not know and could not know until such way-bill had been delivered that the cars contained barley, or what they contained. Especially when the Receiver's agent had, before the statement of counsel had been made, testified positively, and at the instance of counsel for Receiver, that these cars were held by the Receiver on these tracks on orders placed with him by the consignees to hold their barley." (Brief, p. 31).

If the Association, in view of its free storage business, on consideration of "bridge toll," or control of future transportation, and in further view of its own direct agreement with the consignees, and its custom of making a record of each car on its being set to the designated "Ys," and of the daily inspection, in the yards, for "samples," requiring, of course, that the

cars should be opened, and of the days and weeks they were held in the yards, did not know that they contained barley, and who it belonged to, and all about it, its agents, to say the least, were phenominally stupid.

Besides, if this agreement did not apply to the cars when they were burned, it surely would have been irrelevant and immaterial. But opposing counsel made absolutely no objection to its introduction on these or any other grounds.

For what purpose did opposing counsel think this agreement was introduced, if not for the purpose of "contending" that it covered these cars, *since they were the only cars in controversy?* We can see how the agreement might have been a shock and surprise to counsel when they came to give it mature consideration, but we do not see how it can avail them to say that they did not realize the purpose for which it was introduced, nor how they can thus avoid its effect.

(i) The agreement for free storage is an established fact.

In opposing counsel's brief, it is attempted to belittle this testimony by referring to it as "the statement which counsel made" and as the statement of what counsel "expected to prove by certain witnesses," with the accent on the word "*expected*."

They seek, also, at page 15 of their brief, to discredit the agreement by calling it a "pretended arrangement."

The existence of this agreement is an *established fact*, if the testimony of four intelligent witnesses, testifying as to their own acts and doings, can be said to establish any fact in a legal controversy. Opposing counsel admitted it in evidence without objection, and did not attempt to rebut it. Indeed, it was at their own instance that the stipulation, admitting the evidence as to the agreement, was made. We submit that it does not now become them to use language insinuating it to be a fiction. We had the promise of the consignees that they would attend and so testify. We relied on their attendance. They were outside the jurisdiction of the court and could not be compelled to attend. Not until the day before the hearing did these consignees inform our St. Louis agent that, *at the request of counsel for the Terminal Association*, they would not *voluntarily* testify.

We would have compelled them to testify (by deposition) if opposing counsel had not admitted our statement of what we "expected" to prove by them. It may be that counsel thought a ready admission on their part would make the testimony less effective than it would be were they to fight it stubbornly by cross-examination with no hopes of breaking it down,

or denying it on rebuttal. In fact, they did succeed in making the master overlook it entirely. But that did not take it out of the record.

Independent of the agreement between the Terminal and the consignees and of the stipulation establishing it, the record discloses other instances where the Terminal, for the sake of controlling future transportation, held itself out as a warehouseman and offered free storage as an inducement These instances, upon examination, will be found to fully establish and corroborate the existence of such an agreement as that shown in the record and covered by the stipulation.

(j) **Free storage was in fact one of the chief inducements which the Terminal offered to secure business as against its competitors and to procure shipments down the east side of the Mississippi River to East St. Louis.**

The greater portion of opposing counsel's brief is devoted to this effort to explain away and invalidate the testimony of the consignees as to their agreement with the Terminal for the storage of the barley as embodied in the stipulation of counsel. It will not only be of interest, but it should dispel any doubt which counsel have attempted to create as to the application of such testimony, for this court to be in-

formed that the record shows conclusively that the Terminal offered "free storage" facilities as one of its greatest inducements to obtain business which would otherwise have gone to its competitors.

In other words, the Terminal held itself out to the public as a storage and distributing warehouse, and offered its facilities to all shippers so that it might obtain the initial haul on the freight when re-sold, or re-distributed and re-consigned under a new contract of carriage.

In order to secure the witness John Weidmer's, business against the Wiggins Ferry, the Terminal gave him the use of the long wooden warehouse in which the fire occurred, in order to enable him to transfer and assort his hay. Payne Brothers had the use of it prior to that time. Such use included the tracks outside as well as those inside of and passing through the structure—*the very tracks which it is asserted were in the exclusive use of the receiver.* (R. p. 195.)

The witness, August A. Poland, commercial agent for the receiver at St. Louis, testified to a precisely similar, if not the identical, arrangement between the Terminal Association in behalf of the consignees under which the cars were accepted by the Terminal and stored. (R. p. 243-244.)

W. H. Calvert, the local agent of the receiver at East St. Louis, testified to the same or a similar arrangement. (R. p. 245.)

The contract of August 1st between the Peoria Company and the Terminal, out of which so much is sought to be made by opposing counsel, discloses, upon its face, the fact that the Terminal Association was in the business of furnishing "storage room." (R p. 100.) And cars which paid bridge toll were "handled free."

These instances will be found directly in line with the agreement for free storage between the Terminal and the consignees. And fully establish the reasonableness of the proposition that the Association, in receiving the cars in controversy from the receiver, was acting as warehouseman, either in its own right or as agent for the consignees. It was not necessary that it should appear that there was a separate charge made for such storage. The freight to be ultimately paid as compensation for the whole service, *or the delivery for future transportation,* was sufficient consideration for the promise to keep safely and made the Terminal Association a bailee for hire. *Barron vs. Eldredge, 100 Mass., 455.*

And its liability as such bailee began when the goods were delivered at, or rather on, its premises, and when it had either expressly or by implication

received them. A custom may be proved to show an implied receipt of the goods. *Story on Bailments, 9th Edition, 445.*

(k) When new way-bills were issued, time for storage had passed.

Opposing counsel argue that the testimony shows that the consignees had an agreement with both the receiver and the Terminal for holding barley at East St. Louis. This argument is well answered by the Court of Appeals, where, in its opinion, it says: (R. p. 346):

> Whether the receiver, either in ignorance of the agreement of the association with the consignees, or for other reasons growing out of the custom of business between the two companies, supposed himself to be in some sense responsible for the consignments in question, *is not material.* * * * *To a consignee who has provided a place for the receipt and storage of his goods, a carrier is certainly under no obligation to afford like facilities;* and if by reason of an independent contract the carrier has the right to make delivery or store goods in the same place provided by the consignee, the carrier does not, on that account, remain responsible to that consignee for the safety of his goods after depositing them in that place. These consignees, having bargained with the Terminal Association to hold their cars upon its tracks, the tracks became theirs for that purpose, just as much as otherwise they would have been the tracks of the receiver under his agreement with the Terminal Association, and the cars, having been placed upon those tracks, the receiver's possession and responsibility ceased, as they would have ceased if the cars had been placed on private tracks of the consignees; and whether way-bills had been handed over or remained in the possession of the receiver could be of no possible significance.

> The principle of law underlying these propositions, if they are not to be regarded as elementary, are well established and familiar, and are quite in harmony with the opinion in *Mt. Vernon Company vs. Alabama Great Southern R. R., 92 Ala., 296,* and other cases to which reference has been made. See, also, *Pratt vs. Railway Co., 95 U. S., 43.*"

But opposing counsel say that the existence of these two agreements to hold the barley for the consignee should be reconciled in this manner, namely (Brief, p. 39-40):

> "that the arrangement which the consignees had with the receiver * * * was intended to apply while it was standing on the tracks which the receiver used between the *time of its arrival* at East St. Louis, and the *time when it should be way-billed* over to the Terminal Association; and that the arrangement they had with the Terminal * * * applied to the cars of barley after they had come into the possession of that Association in the usual and customary way by the *delivery of way-bills* * * * or to cars which the receiver could not hold on his tracks by reason of the limited space which he had contracted for being fully occupied * * * * *."*

Reconciliation in this manner fails by reason of the fact that *after* the consignees gave instructions for a new way-bill *there was no storage necessary;* the cars immediately began a new transit. The storage, to be of any benefit to the consignees, was from the time the barley arrived in East St. Louis and was set on the tracks of the Terminal, until the grain was sold and a new way-bill made out. *This was absolutely the only storage that could have been contemplated.* No cars were ever held in storage *after* the new way-bill was made out: *the way-bill itself started the cars on the*

new transit. Such way-bills were dependent upon and incident to such re-sale—a matter over which the receiver had no control whatever.

The arrangement for storage could not apply to "cars which the receiver could not hold on his tracks by reason of the limited space, etc.." since from opposing counsel's own view of this case, the receiver had tracks for one hundred and fifty cars, and at the time of the fire there were only seventy cars there. If such agreement is to be construed as applying to cars which the receiver *could not* put upon these tracks, then the agreement did not apply to any cars that were burned, since such cars *were on these tracks*, and only seventy in number.

The evidence, however, is not conflicting. The "arrangement" which is referred to in the testimony of the receiver's witnesses, is the word used to distinguish between the original contract of shipment, and the action on the part of consignee in changing the destination. The word "hold," used by the witnesses can only be construed as *arresting and ending* the original transit of the barley at East St. Louis.

Therefore, instead of there being evidence of two arrangements with the consignee to "hold the barley in storage"—one by the receiver and one by the Terminal—the evidence is of (1) a *custom* on the part of the consignees to arrest the course of the original

transit at East St. Louis, and (2) an *agreement* between the consignees and the Terminal, whereby the latter was to *store* the barley *after* its transit had been *arrested*.

The *custom* is the result of the exercise by the consignees of their right to change the destination of shipments. The *agreement* provided for the care of the shipments from the time they were arrested until the consignees determined the new destination, which was when the barley was re-sold. The custom and agreement do not conflict and need no strained reconciliation, but one follows the other in natural sequence.

(I) If the agreement to store the cars was between the Receiver and the Consignees, then the Receiver is not liable.

If we admit the strenuous contention of the petitioners. *here made for the first time in this litigation*, that the agreement to hold this barley in storage at East St. Louis was between the receiver and the consignees, even then the receiver is not liable for its loss. This Court could then affirm these cases on the well settled principle, that if a decree is right, it can not be reversed simply because the reasoning assigned by the lower court does not apply.

(m) **Such an agreement would at most make the receiver a warehouseman.**

The question thereupon arises—when does the liability of a railroad as a common carrier cease, and when does the liability of a warehouseman begin? To answer the question and to sustain the above deductions, we refer to the case of *Gregg vs. Illinois Central Railroad Company, 147 Ill., 550*, and quote the following from the opinion of the court delivered by Mr. Justice Shope:

> "The law is well settled in this state that the liability of a railroad company as a common carrier of freight, ceases upon the unloading of the goods from the car at the place of destination, and placing them in a safe and secure warehouse; *or, where the carrier is not required, in the usual course of business, or expected, to remove the freight from the car, as in the case of grain in bulk, coal, lumber and the like, by delivering the cars in a safe and convenient position for unloading at the elevator, warehouse or other place designated by the contract or required in the usual course of business; or, if no place of delivery is thus designated or required, on its side track, in the usual and customary place for unloading by consignees.*"

In support of the foregoing, the Supreme Court of Illinois, in that case, cited with approval many prior cases firmly establishing the principle in Illinois, especially *Railroad Company vs. Scott, 46 Ill., supra.*

In stating the above doctrine that Court further says:

> "In all such cases the question to be determined is whether anything remains to be done by the carrier in completion of its contract to safely carry and deliver the

> goods at the place of destination. If there is, its liability as a common carrier continues: If there is not, and the goods remain in the possession of the carrier, its liability in respect thereto, when not varied by contract or usage, is as warehouseman only."

Let us apply that well accepted test to the facts in the case at bar. Did anything remain to be done by the receiver of the Peoria Company in completion of his contract safely to carry the cars and their contents from Pekin, Illinois, and safely to keep, and safely to deliver them at East St. Louis. We contend that in the handling of this class of business, the lines were well established in two ways: First, by the ordinary and usual course of business, which had been in existence for three years; and, second, by the express arrangement between consignees and (admitting for the sake of argument) the receiver; and the lines so established were that the receiver was to haul the cars and contents from Pekin to the end of his rails in East St. Louis, and there place them on certain designated "Ys" belonging to the Terminal, when "the receiver was done with them" and his duty ended. They were then to be attached to by an engine of the Terminal, which engine was to haul them in, break up the train and deposit the cars on tracks in the yards of the Terminal, where they were to await a fresh destination from the consignee. This, the uncontroverted evidence shows, was faithfully done. We have fairly and fully met the rule in the *Gregg case*, and

shown that the receiver was "not required in the usual course of business or expected to remove the freight from the cars," and that the receiver did safely deliver the cars at the "place required in the usual course of business."

From the entire discussion under this point we state these conclusions:

The cars and contents had arrived at the place *of destination* named in the original contract of carriage or designated by the consignees.

The carrier was not required, in the usual course of business, nor expected, to remove the freight from the cars.

No *place of delivery* was designated by the original contract of carriage; the grain was for resale and reconsignment in the same cars.

In the usual course of business, or by special arrangement, the cars and contents were to be placed on the tracks of the Terminal Railroad Association at East St. Louis, there to await the convenience of consignees and a favorable market. ***This was done.***

Pending such resale, the cars, by agreement with the consignees, were in the exclusive custody of the Association, as warehouseman.

Therefore the liability of the receiver had ceased.

II.

In the performance of the original contract of carriage, nothing remained to be done by the Receiver.

(a) A common carrier is under no obligation to notify a consignee of the arrival of a shipment.

Opposing counsel contend that the cars and contents were being held as a common carrier, because no notice had been sent to the consignees of their arrival. There was no obligation on the receiver to send such notice.

In *Transportation Company vs. Hallock, 64 Ill., 284*, the Court says (p. 286):

> "Whatever other courts may have decided on this question, it is the settled doctrine of this Court that the liability of a common carrier terminates with the delivery of the goods in a safe warehouse, *and notice of their arrival is not required to be given to the consignee.*"

After reviewing

Vincent vs. Railroad, 49 Ill., 33,
Railroad vs. Alexander, 20 Ill., 23,
Porter vs. Railroad, 20 Ill., 407,
Davis vs. Railroad, 20 Ill., 412,
Richards vs. Railroad, 20 Ill., 404,
Railroad vs. Scott, 42 Ill., 132,

the Court further says: (p. 287.)

> "These cases were decided upon an examination of many authorities, and the rule declared that where articles to be transported have arrived at their destination, and have been removed and stored in a warehouse owned by the carrier, *or by some other party*, the duty of the carrier is *terminated.*
>
> * * * * * * * * *
>
> These cases also hold that it is not necessary the railroad managers or employers should give notice of the arrival of the goods to the owner or consignee."

This doctrine is also the law in Missouri; see

Gsahweiler vs. Wabash, 83 Mo., 122.

Hotzclaw vs. Duff, 27 Mo., 395.

Cramer vs. Express, 56 Mo., 528.

Rankin vs. Pacific, 55 Mo., 168.

The very late case of *Illinois Central vs Carter, 165 Ill., 570,* reiterates this doctrine in the following language (p. 575):

> "It is well settled that the duty of a railroad company as a common carrier terminates when it has carried the goods to their destination, and there placed them in its own safe deposit or other warehouse. The cases in this Court so holding are cited in *Gregg vs. Illinois Central, 147 Ill., 550.* Nor is notice to the consignee of the arrival or storage necessary to terminate liability as a carrier, but upon warehouseing the liability is at once changed to that of a warehouseman."

This case also bears strongly on the one at bar in another important particular. The shipment there in controversy was of ink from Chicago to St. Paul, to the shipper's order. It was hauled from Chicago to East Dubuque, and delivered to the Diamond Joe Line, and

thence up the river and deposited in its warehouse at St. Paul. After its arrival, the shipper sent direction to the representative of the Illinois Central at St. Paul as to its delivery to various persons, distributing portions in St. Paul and others for reshipment. In carrying out these directions, a mistake occurred by which some two hundred packages of the ink was delivered to the wrong person. The shipper thereupon sued the Illinois Central to recover the value. The declaration is in assumpsit, and counts upon a breach of duty for a failure to deliver goods according to directions. The Court states (p. 574) the contentions of the parties as follows:

> "The theory of plaintiff's case is that the defendant by its receipt and bill of lading, became liable as a common carrier for the through shipment and safe delivery of the goods at St. Paul, and that such liability still existed when the 200 boxes sued for were delivered to E. and J. contrary to the order of July 14th. That of the defendant is * * * * * if the undertaking was for a through shipment, it discharged its duty and liability by safely carrying the goods to their destination, and there placing them in a secure warehouse."

On this state of facts, which shows that the shipper was using the warehouse of the Diamond Joe Line as a distributing point, and that the goods were being stored there for the convenience of the shipper, the Court says (p. 579):

> "It would be unreasonable to hold that the shipper could deal with the goods as he claims to have done and still hold the defendant to the strict liability of a common carrier *during the indefinite period in which he undertook*

> *to leave them in the hands of the carrier for distribution.* Even if Williams (general agent of the defendant) had been the agent of the defendant for the delivery of the goods, we do not understand he could thus extend the liability of the defendant by an arrangement with the shipper for their distribution in the future without some evidence showing he had authority to do so. We think defendant's liability *terminated with the safe carriage and warehousing of the property at St. Paul, and that the plaintiff must look to the Diamond Joe Line, as warehouseman, for any mistake or wrongful disposition of the same by it.*"

This is precisely our contention here. Our duty as a common carrier terminated with the safe carriage and delivery of the barley at East St. Louis, and the shippers or consignees must look to the Terminal Railroad Association, as warehouseman, for its damage and destruction. The consignees were using the yards of the Association as a place of storage and distribution.

While the receiver was under no legal duty to notify the consignees of the arrival of these shipments, still opposing counsel insist that there is nothing in this record which shows that the consignees had any notice of them. This statement is also unsupported by the evidence, as is shown by the testimony of their own witnesses, the shippers themselves.

(b) The consignees had notice.

Mr. E. J. Tuli, Secretary of the W. W. Cargill Company, one of the petitioners herein, testified positively that the consignees were notified every evening of the shipments made that day. (R. p. 256).

Q. "How did your consignee know that cars would be coming to him?

A. "*We notified him every evening* when the boy came down from the elevator. He got down about 5 o'clock. He leaves the notification with the railroad agent where to ship this stuff. He comes to the office and makes out a notification to the party to whom the stuff is to be shipped, giving the car number, date of shipment, etc.

Q. And this is sent to the consignee?

A. Yes, sir.

Q. What is sent to the consignee?

A. *The car number, the date of shipment, the amount of grain shipped, etc.*

Q. Simply in the form of a letter?

A. We have a kind of form for that."

And this form of notice, upon which these consignees were notified every evening of the shipment of barley made that day to them, was made a part of Mr. Tull's testimony, and marked Exhibit "B," and is to be found in the record at page 268.

Mr. S. Y. Hyde, President and Manager of the Hyde Elevator Company, also one of the petitioners herein, testified likewise that the consignees were regularly notified of these shipments (R p. 262).

A "We shipped it from the station in the country, get a receipt for it, and it is brought here to the elevator at LaCrosse, and, when it is properly prepared, consign it to St. Louis, wherever it is to go. Our elevator foreman loads the cars for St. Louis, and a list of the cars that he has loaded during the day is sent to the agent of the C., M. & St. P. Ry., and he is instructed to forward those cars to the consignee at St. Louis. *Then we notify the consignee of the car numbers, the weight and sample (using the form attached and made a part of this deposition, marked Exhibit 'C')* of the barley, whether it is A or B, or whatever it is."

The form used by the Hyde Elevator is also in this record at page 268. The form used by the Hunting Elevator notifying their consignee, is to be found at page 300 of the record.

Mr. Jacob Rau, also one of the petitioners herein, testified in regard to his manner of handling this barley, that he hardly ever received a bill of lading but that he

> "*simply advised the consignee by letter that you [he] had shipped the car.*" (R. p. 293).

Therefore, while reiterating the fact that there was no duty upon the receiver to notify these consignees of the arrival of these shipments, it fully appears from this record that on the night of the very day when these cars were started at their point of origin, the shippers notified the consignees, and it is a mild and safe presumption that long before the cars ever arrived these consignees had these letters from the shippers, advising them of the shipment. It was their duty to be on hand to receive the cars.

(c) In point of fact they were always on hand to note and tally arrivals.

Calvert, chief clerk for the receiver at East St. Louis, says:

> "The consignees have representatives who make regular trips to the various yards in and about East St. Louis *daily* for the inspection of this grain, and samples are se-

> cured from the cars and taken on 'Change or on the Board of Trade, if you choose, and there the grain is sold by sample; unless in some cases where a sale is made and a certain grain is guaranteed, and in that case, as I said yesterday, that is barley that goes straight through without stopping.
>
> Q. I understand you to say these inspecting agents are agents of the consignees?
>
> A. *Agents of the consignees;* that is, the firms to whom the barley is consigned in the body of the way-bill—commission." (R. p. 232).

We suggest, also, that if as a matter of fact these consignees did not have actual notice of these shipments, opposing counsel would have had them to so testify.

(d) Receiver owed no duty as a common carrier to store cars and contents at East St. Louis for the convenience of the consignees.

Opposing counsel contend that it was the duty of receiver to furnish facilities for breaking up his trains, and placing the cars on proper tracks, preparatory to making a delivery to his connections, and argue therefrom that it was immaterial whether he owned the facilities or employed the Terminal Association to fnrnish them.

Even if the legal proposition stated is correct, the conclusion does not follow, for the reason that the services being performed by the Association at the time of the fire were *not* the acts of taking the trains and breaking them up in accordance with the contract

entered into with the Peoria Company. *After* this service had been performed, and at the time of the fire, the Terminal was performing a *distinct duty* it owed to the consignees. by virtue of an express agreement to

"hold the cars on their tracks at East St. Louis"

for the convenience of these consignees. (R. pp. 239, 240.)

The property was not damaged or destroyed durin the performance of any duty owed to petitioners by the Terminal or by the receiver, as a common carrier. Neither were under any obligation as a common carrier to store the property for an indefinite time for the convenience of the consignees. Such an undertaking is no part of a common carrier's duty, and if it is to be performed it must be the subject of a distinct and express agreement, ***which the record shows existed between the consignees and the Terminal Railroad, and with which the receiver had no concern or interest.***

The *Covington Stock Yards Case, 139 U. S., 128,* cited by opposing counsel, involved a controversy wholly foreign to this. The main question determined there was whether a common carrier could be compelled to receive and deliver ***live stock*** at a platform and chute provided by a shipper, or deliver the same free from extra charge for its passing through the yards of the appellant. The Court there said:

> "The railroad company holding itself out as a *carrier of live stock*, was under a legal obligation, arising out of the nature of its employment, to provide suitable and necessary means and facilities for receiving *live stock* offered to it for shipment over its road and connections, as well as for discharging such stock after it reaches the place to which it was consigned."

It cannot be said that the obligation "to provide suitable and necessary means and facilities for receiving" barley offered to the receiver for shipment, "as well as discharging" such barley "after it reaches its destination," had not been fully performed *before the fire.*

If the receiver was under any obligation by reason of his employment as a public carrier, in addition to transporting the barley the whole length of his rails, to provide a distributing warehouse at a point beyond his own terminus and there hold and store the grain subject to the convenience of the consignees, then the Covington Stock Yards case becomes pertinent, and the rule there announced that it would not concern the petitioners whether the receiver discharged this obligation or employed the Terminal to do it, would be applicable. *But such storage of grain is no part of a common carrier's duty.*

In the application of this test below, it was argued by opposing counsel that one act remained to be performed by the receiver, and that was, he should deliver to the Terminal Railroad Association new way-

bills or manifest showing fresh destination of the cars. In reply to this our contention then was, and now is, that such new way-bill was the creation of a new contract of carriage by the consignee, and incident thereto, and not the performance of any act of the original contract of carriage. The relations of the receiver to such new contract might be those of forwarder or accommodation agent, in that behalf, for the consignee or consignor, but not those of a carrier.

No case can be found imposing upon the carrier the duty of making out new way-bills, as part of the original contract of carriage, or as incident thereto, where goods have been once delivered at the designated place of deposit for unloading or distribution and further transportation, at the pleasure or convenience of the consignee.

It may also be contended that there remained for the receiver to obtain the direction of the consignee as to where the consignee desired the cars to be finally sent. The reply to this is again, that such directions came only after the original consignee had sold the goods in question to a third party, either by private sale or on the Board at St. Louis, and when such direction did come *it was the beginning of a new contract of carriage;* the goods became the subject of a re-shipment, the consignee became the consignor and quite another person or company the consignee, and the destination was altered accordingly.

Thus, all the acts of the receiver in connection with the barley, or cars containing it, after they had been set to the tracks of the Terminal Association at East St. Louis, were acts not performed in the execution of the *original contract of carriage* from the shipper to the commission broker, but were incident to a *new and distinct contract* of carriage from East St. Louis to the fresh destination indicated by the consignee, and in which the consignee of the original contract became the consignor, and the new purchaser became the consignee. That the duty of the receiver in that behalf was simply the transmission by him of the instruction of the original consignee to the Terminal Association, is clearly shown by the following evidence of the witness Calvert (R. p. 215):

> Q. "I omitted to ask you as to these cars coming to the C., P. & St. L. from the C., M. & St. P., how long, as a rule, the consignees left them there?
>
> Objection. Incompetent, immaterial, irrelevant, not in the issue.
>
> A. That is a pretty hard matter for me to give an intelligent answer on.
>
> Q. Shortest and longest time?
>
> A. There is a great many of the cars we have orders for before they arrive, giving us designated points for their delivery. Then there are a great many of them we do not get orders on for some time. Furthermore, there is one or two of the firms there that place an order at the beginning of the season to give either the Wiggins Ferry Company or the Terminal Railroad Association all their business, which is then held by the Terminal Association or the Wiggins Ferry Company, and forwarded on to the destination by orders direct from the consignee—

either the Wiggins Ferry Company or the Terminal Association. I should judge the average of that barley business would be, well, I will say a week. That is simply my guess.

Q. Give me the shortest time and the longest time then; the average in your opinion?

A. Some of them would stay there for thirty days; and then some would go right through without stopping.

Q. Dependent on?

A. Dependent on the condition of the market, and the market was governed altogether by the condition of the weather. During the warm weather they wouldn't unload; if we got a cold spell we would get a rush on barley; warm, slack up.

Q. After cars arrive you put them in the designated place of deposit on these Y's, by means of your engines. I will ask you whether or not you proceeded to take the direction of the consignee pursuant to the way-bill that accompanied the car, as a new matter outside of the way-bill and for the convenience of the consignee?

A. New matter altogether. All barley business handled under special instructions issued by the consignees of the shippers. Furnished way-bills to us. Information furnished on the way-bills to us; not so, all of it; some, where it was billed directly through, of course, not stopping; didn't ask the consignees for the disposition of that, but that is only to a brewery, for instance, that they may know just how much they want to use, and have it billed that way; but all the other firms, go and get special orders from the consignees."

Cross-Examined.

Q. Then, with such a bill marked Teichman Commission Company, St. Louis, Mo., before you refer the matter to the agent at Wycoff, where the shipment started, you will find out where the Teichman Commission Company was, and where you could made delivery of the cars?

A. Yes, sir.

Q. This testimony you have been giving with reference to customs applies generally to shipments of barley?

A. Yes, sir; so far as the C. P. & St. L. is concerned. Can't answer as to the custom on other roads.

Re-Direct.

Q. "I will ask you, would you have undertaken to send this car to St. Louis if you didn't get the direction?

A. "No, sir; because I would have had no guide.

Q. "East St. Louis was the destination?

A. "Yes, sir; until we received orders from the consignee as to the final disposition."

Re-Cross

Q. "You would seek out information to enable you to make delivery of the contents of that car?

A. "Yes, sir.

Q. "Taking the way-bill as a starter to find out?

A. "Yes, sir.

Q. "The only means you had?

A. "The only means I had of learning to whom I should go for the order."

Re-Direct.

Q "It is suggested by the receiver, who is present, and I will ask you if it is not and was not the ordinary way of billing these cars, to bill them to East St. Louis and then leave the consignee to direct you as to how or by what route they were to be shipped further to the final point of disposition?

A. That is the custom of billing on lines entering East St Louis."

Upon the above evidence, supported also by that of Stapleton; the Receiver, and the consignees, we submit this fair conclusion:

The acts of the receiver subsequent to placing the cars on the "Y's" of the Terminal at East St. Louis, were not acts performed in connection with the execution of the *original contract of carriage*, and therefore can not be said to be acts which remained to be done by the carrier as an incident to or in relation to such original contract.

(e) The duty of the receiver to safely carry and deliver freight having ended, any custom or practice of his employes in aiding the consignee in giving directions for future transportation was purely an accommodation to the consignee, for which the receiver was in no wise responsible.

Much is made, by opposing counsel, of the fact that often the receiver's agents, after receiving instructions from the consignees would make out the new way-bill and deliver it to the Terminal. Counsel contend, as we have seen, that the delivery of this *new* way-bill was absolutely essential to relieve the receiver of liability, but in support of that contention they cite no authority except cases involving through shipments between connecting carriers. In all such cases the original way-bill showing the through carriage and the ultimate destination is forwarded. Here there was no through carriage. The original way-bill showed upon its face that the freight

had reached its destination. The only instruction to be delivered pertained to future transportation under a new contract of carriage. The attention of the court has already been called to the fact that the *new* way-bill which was made out was a Terminal way-bill—that is, it was filled in on Terminal blanks, provided by it for that purpose, and in which the Terminal appears as the initial carrier. This is clearly established by the testimony of Beecham, the employee of the St. Paul company, and of Phelps, the local agent of the Terminal Association. Exhibits "L," "T." "U," and "V." (R. p. 133-140 and 162).

Very often the information necessary to fill such blanks was communicated by the consignees directly to Roederer, freight agent for the Terminal Association and joint agent for the Terminal and Merchants Bridges. (R. p. 211.) And from whom Phelps received orders. (R. p. 83)

Opposing counsel, in their brief, leave the impression that Roederer was the agent of or had some official relation to the receiver. This is entirely gratuitous. His precise employment is fully stated above. The testimony shows that "a great many times" such information was sent by the consignees direct to the Terminal. (R p. 192).

Now, we submit, that the custom of receiver's employees in becoming the channel through which the

information as to a fresh destination was usually communicated by the consignees to the Terminal, and which enabled the latter, under a new contract, to move freight over its own line, the physical possession of which it already had, can in no wise affect the receiver's liability either as carrier or warehouseman under the old contract of carriage; because the communication of such information was no part of the original contract of carriage, and was wholly beyond the line of duty of the receiver's employees.

The performance of these acts by the receiver's employees was wholly gratuitous and purely an accommodation to the consignees. They were anxious to get and keep all the business possible; to do this clerical work was very little trouble since they already had in their office the original data, and it was certainly a great accommodation to the consignees. If it was no part of the duty incurred under the original contract, or incident thereto, its performance was unnecessary to a compliance with that contract.

In *Jewell vs. Grand Trunk Railway, 55 N. H. 84*, the Court says:

> "It is difficult to see how, after defendants' duty had ended as to the delivery of the freight, any custom or practice of Monneghan's (its employe), in assisting consignees in moving or loading their goods, can affect the defendants. The defendants are only responsible for their servant's acts when acting within the line of his duty, and within the line of their duty to their consignees. When that duty has ended, they are no more responsible for his acts and doings than for the acts and doings of any other person."

Why, therefore, should any inference be drawn, or assumptions based, on these acts of the receiver's employees wholly outside of their line of duty, in reference to his discharge of liability under the terms of the original contract. And it is to be remembered that this litigation is between the receiver and the consignors on that contract, and not between the receiver and the consignees on some other contract or relation. If there was any default on the part of the receiver in the matter of imparting such information, it was, at the most, only a duty to the consignees, incident to the next contract of sale and carriage, with which the original consignors, the petitioners herein, had no concern. The liability, if any, therefor, can only be to the consignees.

(f) Goods held subject to orders are held as warehouseman.

In *Railroad vs. Montgomery, 39 Ill., supra*, it appeared that hay was placed on cars one Friday; on the next morning the conductor of the freight train was about to take it away, when the consignor said he did not wish it to go until he could see the person to whom he had sold it. The cars were left, and on the next day the hay was destroyed by fire from a passing locomotive. On this state of facts, the Court said (p. 337):

> "the technical liability of a common carrier does not attach until the delivery to him of the property is com-

plete. If, for example, the same person is common carrier and warehouseman, and he receives goods to be forwarded when he has orders from the owner, his liability in the meantime is that of a warehouseman, and not that of a common carrier."

This principle is well established.

Railroad Co. vs. Scott, 42 Ill., supra.

Cairns vs. Robbins, 8 M. & W., 258.

Pittsburgh vs. Barrett, 3 Am. & Eng. R. R. Cases, 256.

Michigan R. R. vs. Northern R. R., 7 Mich, 515.

O'Neil vs. N. Y. Cent., 60 N. Y., 138.

Barron vs. Eldredge, 100 Mass., 455.

Nichols vs. Smith, 115 Mass., 332.

Hutchinson on Carriers, Sec. 82.

Angell on Carriers, Sec. 134 and note.

This principle has also been forcibly illustrated and applied by this Court in *St. Louis R. R. vs. Knight, 122 U. S., 79.* There it appeared that one Potter was a cotton broker at Texarkana; that he bought most of his cotton at points in Texas, on railroads running into Texarkana; that it was brought to Texarkana on the railroads, and delivered on the platform of a compress company, to be compressed before being reshipped north and east; after arrival on the platform it was weighed, classed and marked by Potter, after which *the railway company* was to compress it before shipping north, and pay for the compressing; after being compressed it was set out on the loading plat-

form, and was then shipped to such consignees as Potter directed; when the superintendent of the compress certified that cotton had been delivered for compress, the railway company issued bills of lading therefor to Potter. The cotton accumulated faster than it could be compressed and shipped.

In that case it was held that the liability as a carrier did not attach until Potter had designated the consignees, although bills of lading had already been issued by the railway company. The Court says:

> "It may be said that the defendant's liability as a common carrier commenced at a time antecedent to the delivery of the cotton to be loaded on the cars; that it might have arisen on a prior delivery of the cotton in question in the warehouse to be compressed and then transported, *the duty of compressing it, in order to prepare it for transportation, having been undertaken by the defendant.* This, however, could only be when the specific goods, as the property of the plaintiffs, were delivered for that purpose into the exclusive possession and control of the defendant. Such was not the case in the present instance. No specific bales, as the property of the plaintiffs, separate from all others, were delivered to the defendant for them *until the 525 bales in controversy were set apart and delivered to the defendant for immediate transportation on its cars;* and prior to that time all cotton received in its warehouse to be compressed, was received as the property of Potter, on his account, and subject, so far as grading, classifying and marking were concerned, to his control, *and none of it could be considered as having passed into the possession of the defendant as a common carrier* for transportation until designated and set apart by Potter or his agents."

This case is confirmed by the later cases of *California vs. Compress Co., 133 U. S., 387,* and *St. Louis Co. vs. Ins. Co., 139 U. S., 223.*

In the case at bar the cars and contents were awaiting a fresh destination, which could only be ascertained after the consignees had sold the barley and indicated who the new consignee was to be. Until these acts had been performed by the consignees, *whoever* held the cars and contents, held them simply as warehouseman.

But in the *Knight case* we find further facts which bring the two cases, if possible, even closer together. The Court there continues:

> "The cotton received at the company's warehouse came consigned to Potter upon bills of lading issued by other railroad and transportation companies at the point of shipment for delivery to him at Texarkana. Supposing, as one view of the evidence authorizes, the bills of lading were issued by the agents of the defendant to Potter in advance of the actual delivery of the cotton in the warehouse, on the faith of the bills of lading produced and surrendered by him, given by other carriers; still, the cotton, as it came and accumulated in the warehouse for the purpose of being compressed, continued to be the property of Potter, subject to his control in the respects already mentioned, and until specific lots were marked and designated, so as to correspond with the bills of lading previously issued by the defendant, *the latter had no possession of the property as a carrier.*"

It is because there remained ***something to be done by the consignees,*** before the cars could be moved from East St. Louis, where they were deposited on their arrival, that we submit, no matter who had possession, *such possession was not that of a carrier.*

(g) **Where the consignees are accustomed to use the warehouse of the carrier, the transit ends when the goods arrive.**

The principle is also well established that where the consignee, having no warehouse of his own, is accustomed so to employ that of the carrier, the transit ends when the goods arrive and are set at the usual place of storing, even though they immediately receive a fresh destination.

In *Foster vs. Frampton*, *6 B. & C., 107*, where goods are to be delivered to the vendee at a particular place, the *transitus* in general continues until they are delivered to him at that place. But if he, by his own act, prevent the delivery, which otherwise in the ordinary course of business would take place, and does any act equivalent to taking possession, the *transitus* is thereby terminated. And, therefore, where the vendee of several hogsheads of sugar, upon receiving from the carrier notice of their arrival, took samples from them for his own convenience, and desired the carrier to let them remain in his warehouse until he should receive further directions, and before they were removed, the vendee became bankrupt, it was held that the *transitus* was at an end.

This principle is well illustrated in cases involving the right of *stoppage in transitu*, since it is well es-

tablished that such a right does not exist unless the goods are still in transit and have not been delivered to the consignee.

In *Scott vs. Petit, 3 Bosanquet & Pullier, 469*, it appeared that on the 16th day of March, goods were forwarded from Manchester addressed to A, at the Bull Inn, London, in consequence of a previous order from him. On the 23d of the same month the goods were sent to the defendant's house, as the packer of A, the latter having given no direction at the Bull Inn respecting these particular goods, but having given a general order that all goods addressed to him should be sent to the defendant, A having no warehouse of his own. On the 11th day of March, A committed an act of bankruptcy. When the goods arrived at the defendants, they were booked to the account of A, and the defendant not knowing of A's bankruptcy, unpacked the goods to ascertain their contents. On the 31st day of March, the goods were claimed by the consignors, and on the day after by the assignees of A, against whom the commission had been taken out.

The consignors claimed the right of ***stoppage in transitu***, to support which it was necessary to show that the goods had not been delivered to the consignee. The Court, however, held that the ***transitus*** of the goods was at an end when they arrived at the defendant's house; and consequently, that the consignor's right of ***stoppage in transitu*** did not exist, and that

the plaintiffs, as assignees of A, were entitled to recover them in an action of trover. The Court said, p. 472:

> "In this case it seems to me impossible to raise a doubt, whether the transit was at an end or not; for if the bankrupt had no warehouse to receive the goods, but that of the packer, the transit never could be at an end if it did not end there. * * * * *
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> "If the bankrupt in this case had possessed a warehouse of his own, and the packer had merely taken them as a middle man, the consignors might have stopped them. But there being no other place of delivery but the warehouses of the packer, the goods when received there had gone to their last place of delivery, and consequently were no longer subject to the right of *stoppage in transitu*. * * *
>
> If the warehouse of the packer was not to be considered as the place of delivery of the bankrupt in the case, there could be no place of delivery at all, for the bankrupt had no other opportunity of receiving the goods but by the hands of defendant." (p. 473.)

Another case in which the same question is presented, is that of *Rowe vs. Pilford, 8 Taunton, 83.* There it appeared that a trader in London was in the habit of purchasing goods at Manchester and exporting them to the Continent soon after their arrival in London. The goods so consigned to him remained in the wagon office of the defendants, who were carriers, until they were removed by his agent for the purpose of being shipped. The consignments of goods for the trader was delivered to the defendants on the 9th and 12th of August; on the 14th and 17th inst. the goods arrived at the wagon office of the defendants, on the 16th or 17th inst. the trader became bankrupt, and

on the 19th inst. notice of non-delivery to the bankrupt was given by the consignor to the defendants, who, according to order, delivered the goods, on the 21st, to a third house The assignees of the bankrupt, the consignees, brought an action to recover the goods, and it was there held that they were entitled to the same, and that the right of the consignor to *stoppage in transitu* ceased on the arrival of the goods at the wagon office of the defendants in London. In support of the conclusion there arrived at, the Court said, p. 85:

> "In *Richardson vs. Goss, (3 B. & P., 127) Chambre, J.*, said that he was strongly inclined to think, that, if a man be in the habit of using the warehouse of a wharfinger as his own, and make it the repository of his goods, and dispose of them there, the journey would be at an end when the goods arrived at such warehouse; and, in *Scott vs. Pettit (3 B. & P. 472) Lord Alvaney* said, he perfect'y coincided with *Mr. Justice Chambre* in that which he had intimated in the former case. Both these cases were recognized in *Dickson vs. Baldwin, (2 B. & P. 578)* and there were confirmed by *Lord Elenborough.*"

In *Allen vs. Gripper, 2 Compton & Jervis, 218*, this principle is applied to a state of facts *strikingly similar* to those in the case at bar.

Lord Lyndhurst, C. B., says (p. 220):

> "The facts of the case are shortly these: Pestall had been in the habit of employing defendants for several years; and the course of dealing appeared to be, that the oil cakes were carried to Hertford, in the defendant's barge, and deposited in the defendant's warehouse, generally, for many months. * * * * * * There was also evidence to show that they were so deposited

for the convenience of Pestall, that they might be distributed to his customers, many of whom resided in the neighborhood. * * * * On this state of facts it appears to me that the *transitus* was at an end."

On the same question *Bailey, B.*, says (220):

"It appears by the evidence that the defendant's warehouse was the place at which these goods were to stop, and that the warehouse was to be considered, for the purpose of depositing these cakes, as the warehouse of Pestall, the purchaser. *The goods were not to be forwarded to Baldock* (where Pestall carried on his business) *without fresh orders; and they were to go*, according to the evidence in the cause, *to Baldock, or the customers of Pestall, as he should direct.* He thus had the complete power of giving a new destination to the goods, *and when they arrived at the place where they were to await such fresh destination*, the *destination* contemplated by the plaintiffs and Pestall *was at an end.*"

In view of these decisions, the conclusion of the master, sustained by the dissenting opinion of Judge Jenkins, that the goods were in transit, is clearly against the weight of authority.

(h) By arrangement the consignees used the tracks of the Terminal Association for warehouse purposes.

In support of the above we refer again to the stipulation as to the evidence of the consignees, quoted at page 20 above, and the testimony of W. H. Calvert, found at Record page 231, in which he says:

"Well, the class of freight allowed to stand there consists of grain, barley in particular; hard coal, pig iron and salt, and other commodities that are held on what we term the market; in other words, forwarded there, (not

in all cases, but as a rule) and held for the accommodation of the consignees, which is virtually for the interest of the shipper; the barley being held on commission to await an advance in the market: in other words it comes in there, and if the market is all right when it arrives, they sell it immediately, but as a rule, hold it until the market suits them."

The above evidence stands uncontradicted. From it there is but one logical deduction, and that is that the barley was held on the tracks of the Terminal Railroad Association, in their yards at East St. Louis, as a distributing point, free of storage for the convenience of, and for the purpose of giving the consignees an opportunity to sell the same, when they thought the market had reached its highest point, and after selling the same, to re-consign it in the same cars to the purchasers.

The moment the Terminal had attached its engines to these cars, *there was a physical delivery of the cars and contents to it*, and into its exclusive custody to hold the same awaiting further instructions, *not from the receiver for a continuance of the original contract of carriage, but from consignees for a fresh destination and new contract of carriage.* If the agreement to hold them there was with the receiver, he held them as a warehouseman only.

If, afterwards, loss resulted, the receiver would not be liable as a common carrier therefor.

This rule is well settled in the *Gregg case, 147 Ill*, *supra*, where the Court says, at page 559:

> "It is urged that the railway company was at fault in depositing the grain with Dunbar and Company, whose warehouse was submerged by the flood, when there were other elevators and warehouses at Augusta upon higher ground, and which were not affected by the flood, in which the grain might have been stored. The question of whether it could have been thus stored may be said to be a controverted question of fact. But waving that, and also, for the present, the question of whether Dunbar & Company were not the agents of appellant to take care of and store the grain, the court was justified in holding, as it did in effect, in its rulings upon the propositions offered, that the railroad company was not liable because of storing with Dunbar & Company.
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> * * * * * * * * *
>
> The railroad company was not required to keep the corn in its cars on track indefinitely, and although the consignee was in fault in not receiving the freight, after reasonable time and opportunity had been afforded in which to take it, the carrier could not abandon it, but was required to exercise ordinary and reasonable care for its preservation as warehouseman. *In the exercise of such care it might leave it in the cars*, store it in its own warehouse, assuming the liability of bailee or warehouseman therefor, *or it might, with the exercise of a like degree of care in selecting a responsible and safe depositary, STORE THE GRAIN IN AN ELEVATOR OR WAREHOUSE AT THE EXPENSE AND RISK OF THE OWNER, AND THEREBY DISCHARGE ITSELF FROM FURTHER LIABILITY.*"

How much stronger the case at bar! Since the Receiver was not required to exercise any degree of care in selecting a responsible and safe depositary, for that depositary had been already selected by the consignees themselves, and the receiver, in placing the cars on the tracks of the Terminal Association, simply carried out the orders of the consignees to have the grain so

deposited in accordance with the agreement the consignees had theretofore entered into with the Terminal Association for storing the grain.

It was the custom of the Terminal Association, as has been abundantly shown in the evidence, to receive these car loads of barley on their tracks at East St. Louis for the purpose of storing them there free, for the convenience of the consignees, and for the further purpose of controlling their transportation to a fresh destination, to be indicated by the original consignees when they became the consignors in a new contract of carriage. If this custom cannot be denied, then it is well settled by the law that the deposit of the cars by the receiver on the tracks of the Terminal was delivery to the latter for the purposes of the original consignees.

This is settled in *Pratt vs. Railway Company, 95 U. S., 43*, where the Court said:

> "If a common carrier agrees that property intended for transportation by him may be deposited at a particular place without notice to him, such deposit amounts to notice, and is a delivery; * * * and that such an agreement may be shown by a common practice and usage to so receive without special notice."

In the above case it was held that such a delivery to a railroad company created the liability of a common carrier. But it was also held that *if the goods so delivered to the railway company were subject to the further order of the owner*, then the case would be otherwise, and that it is well settled, under such cir-

cumstances, *the railway company's liability is that of a warehouseman only.* This latter condition was the exact state of affairs at East St. Louis. The receiver delivered the cars into the exclusive custody of the Terminal for ultimate transportation, under a new contract of carriage to be subsequently entered into; but in the meanwhile such cars were to be subject to the further order of the consignee for fresh destination after re-sale.

(i) Being sued as a carrier, recovery can not be had as a warehouseman.

The allegations are specific that the property was in transit. If this is so, the liability charged is that of a carrier, and to recover under such an allegation, the proof must show a breach of a common carrier's duty. We quote from one of the petitions, all of which are the same as to the liability alleged (R. p. 21):

> "there delivered to the Chicago, Peoria & St. Louis Railway Company, to be *transported* by it to destination; that the said last named company received said two car loads of barley, and *transported* the same as far as East St. Louis, a station on its line, *and while the same were in transit and on their way to destination*, and in the possession and under the control of said last named railway company, the said two cars containing said barley were destroyed by fire * * * * *"

Irrespective of the question in whose possession they were, the evidence is conclusive that they were being held at East St. Louis, subject to the orders of the consignees for a new destination.

It is certainly fundamental that the recovery must be on the liability charged in the pleadings. It would have been impossible to have charged the receiver with the liability of a carrier and a warehouseman at the same time, *i. e.*, the time the goods were destroyed; the goods could not have been held both as carrier and warehouseman; it must be one or the other. The selection was made and cannot now be changed.

In *St. Louis R. R. vs. Knight, 122 U. S. 79*, the defendant was sued as a common carrier, and as in the case at bar, the evidence showing something remaining to be done by the shipper, the plaintiffs attempted to fall back on the warehouseman's liability. But the Supreme Court would not permit it, saying:

> "The suggestion in the charge of the Court of a possible ground of liability on the part of the defendant as a warehouseman, *was entirely outside of the issues.* The defendant was not sued upon the ground of any such alleged liability. No facts and circumstances, out of which any duty as a warehouseman could arise, were set out in the declaration; the action was upon the bills of lading alone. The contract alleged to have been made and broken, was contained in them. The duty charged to have been violated was the duty of defendant as a common carrier for an alleged negligence in the transportation of the goods. And if the defendant could be supposed, upon the facts proven, to have incurred liability in its character as a warehouseman, as distinguished from its capacity as a carrier, that liability was not incurred in respect to the plaintiffs. *It is not charged that the defendant, as a warehouseman, received any goods as their property for the purpose of storage and safe keeping.* Its relation as a warehouseman was with Potter, and him alone. *It was an error, therefore,* in the court to charge the jury that the defendant might be charged in this action for the loss in question upon its responsibility as a warehouseman to the plaintiffs."

It may be contended that the amended petitions charge the receiver with the liability of a warehouseman, but this contention cannot be sustained. The amended petition (R. p. 52) as a premise, *restates* "all the allegations contained in the petition of each one of the foregoing interveners, as hereinbefore made and filed herein." all of which expressly aver that the cars were consigned to St. Louis, Missouri; that the cars were *in transit*; that they were in the possession of the receiver *for transportation*; *and stating facts which negative the theory that the possession was for storage.*

If the cars were not at their destination, but were in course of *transportation,* the mere fact that *incidental* to a delivery to the next connecting carrier, storage was necessary, *does not change the character from carrier to warehouseman.* This is decided in *Railway Co. vs. Mfg. Co., 16 Wall., 318.* Pleadings must be construed as a whole; by express allegation this amended petition is made a part of the original petitions; and the pleading as a whole must be construed strongly against the pleader.

Therefore, even if the facts set out in the amended petition, are such as aver a storage of these goods, that averment of storage can only be construed *on their own and oft repeated theory of the case,* to be a storage incidental to the carriage, and such possession

was that of a carrier *and not of a warehouseman.* The recovery, therefore, must be as a carrier, and not as a warehouseman.

If the pleadings charge the receiver as a warehouseman, it is for the breach of a duty owing to the consignors. Under the evidence, the duty to warehouse was for the benefit of the consignees; no storage was contemplated in the original contract for the consignors; such storage had reference to the new contract of carriage which was subsequently to be made, and with which the original consignors, these appellants, had absolutely no concern. Therefore, any breach occurring in that respect is to the consignees, who are not parties to this litigation, and as was said in the *Knight case, supra:*

> "Its relation as a warehouseman was with Potter, *and him alone.* It was error, therefore, in the court to charge the jury that the defendant might be charged in this action for the loss in question upon its responsibility as a warehouseman *to the plaintiffs.*"

So we say here, if any relation as a warehouseman existed, it was with the consignees, *and with them alone,* and it would have been error to permit the consignors to recover on the liability of a warehouseman.

(k) **The execution of such an agreement for storage would have constituted delivery to the consignees.**

If, as contended by opposing counsel, this agreement to store the cars on these particular tracks, was entered into between the receiver and the consignees, it was independent of the original contract of carriage, since there is no common law duty imposed on a carrier to store barley (the destination of which has been changed) for the purpose of permitting the consignees to sell it when the "market" suited them—and was tantamount to the consignees providing for the receipt and storage of such barley. As His Honor, Judge Woods, says in this case, (R. p. 346) and quoted more fully above:

> "These consignees having bargained with the Terminal Association to hold their cars upon its tracks, the tracks became theirs for that purpose, just as much as otherwise they would have been the tracks of the receiver under his agreement with the Terminal Association, and the cars having been placed upon those tracks, the receiver's possession and responsibility ceased, as they would have ceased if the cars had been placed on private tracks of the consignees; and whether way-bills had been handed over or remained in the possession of the receiver, could be of no possible significance."

This conclusion of Judge Woods, that the tracks became private tracks of the consignees, follows, just

as logically, irrespective of which railroad the agreement was made with by the consignees, and is in harmony with the rule laid down as to cars in *Rail-Co. vs. Railway Co., 123 Ill., 594*, cited at page 68 of opposing counsel's brief.

Let us take apposing counsel on their own argument: They base their right to recovery in these cases on the contention that the agreement of August 1, 1892, between the Terminal and the Peoria Company, by which the former was to give the latter certain storage room, acted as a conveyance of the tracks of the Terminal to the Chicago, Peoria & St. Louis Railway. If this is so, then it follows, quite as logically, that if the receiver entered into an agreement with the consignees, whereby he was to give them certain storage room for their barley, this also acted as a transfer to them of the tracks, and made those tracks the private tracks of the consignees.

If these were the private tracks of the consignees, then it cannot be questioned but that the placing of the cars thereon by the receiver constituted a delivery to them.

III.

The cars and contents were delivered to and accepted by the Terminal.

While we admitted above, for the sake of argument, that the agreement for storage was between the receiver and the consignees, *still we insist, as a matter of fact*, upon the decided weight of evidence, *it was between the consignees and the Terminal.* The consignees themselves concur and join in saying so. The question then arises, were these cars delivered to the Terminal?

(a) Pursuant to custom the cars were set to a designated place of deposit.

The record shows beyond any question that the cars were hauled by the receiver to a point on certain "Y's" belonging to the Terminal, where according to the custom existing between the two carriers, the latter sent its own servants with its own engine and took and held exclusive custody along with physical possession of the same (R. pp. 74, 213). In addition to this, it was the custom of the Terminal to take a record of all such cars deposited on these "Y's."

George H. Phelps, local agent of the Terminal at East St. Louis, sworn in behalf of the petitioners, testified as to the exact location of each car at the time of the fire. (R. p. 75).

Q. "Now you have a list of these cars; will you designate on which tracks these various cars were standing *at the time of the fire*, as near as you can.

A. *I can give you the track each car stood on; they stood on the tracks from 40 to 50, and I can give you the individual car numbers and the tracks they were on.*"

The witness then did so, naming each car and each track (R pp. 75–6–7). This shows a definite knowledge on the part of the Terminal of these cars being on their tracks. How did it come to know that these cars were there if it had nothing to do with them? The fact is they took a record of such cars every day and even knew what trains of the receiver the cars would come in on. (R. p. 77).

A. "I can't say what track that was on: that car arrived on train 37, and it was not set on these tracks until after our records were taken, so I am not able to say."

In another place counsel for petitioners asked Mr. Phelps if he had examined the records, and could state when the seventeen cars of the C. M. & St. P Company, involved in this controversy, arrived at East St. Louis, to which he replied he could, and proceeded to do so. (R. pp 95, 96).

And this was not the mere personal knowledge of the witness. as appears on cross-examination (R p. 97), but was obtained from the records of the Terminal.

Q. "Did you know personally about each of these cars, as to whether they had been, or not, delivered?

A. Consulted the records.

Q. Who made the records?

A. Clerks in our employ."

Again, on cross-examination, this is further established. (R. p. 84).

Q. "In designating these tracks in red on the blue print, and the cars standing upon them, did you do so on your own knowledge, or from information derived from others?

A. From records taken from our yard clerk.

Q. When were the records made up, before or after the fire?

A. Both before and after the fire: that day, and in the morning after the fire."

But opposing counsel will, of course, say that this fact of the Terminal making a daily record of these cars as they were set to their tracks, was of no significance, and that beyond question it did not show a delivery of them to the Terminal. Such a contention might have weight if it did not further appear from the petitioners' own evidence that the Terminal, when it made these records, *ENTERED THESE CARS THEREIN AS HAVING BEEN DELIVERED TO IT ON THE VERY DAY AND HOUR OF THEIR ARRIVAL IN THESE YARDS.* This is shown by "Ex. C," identified by, and made a part of, the testimony of Mr. Phelps, the agent of the Terminal. (R. pp. 102-92). From this transcript of the records of the Terminal appears the car number, "initial, date arrived J. S-E., date delivered, bridge, date of billing, C., P. & St. L. to Eads bridge."

A reference to this record *made by the Terminal acknowledges delivery to it* of the cars arrived, at the certain minute on the *same* day, and does not show a new way-bill under the head "date of billing" for days and weeks after the "delivery."

This record is not of the particular cars in controversy, but was introduced by petitioners *to show the custom* of handling this class of business, and is a fatal admission on the part of the Terminal that it was the "*custom, practice and usage*" to make, by its yard-clerk, contemporaneous record of arrival upon, and to accept cars set to this "designated place of deposit" *and delivered to it* for the purpose of storage, *without further notice.* If the record of the Terminal for *these particular cars did not* show such a delivery, opposing counsel *would certainly have introduced it.*

We rely on the law as laid down by this Honorable Court in the case of *Pratt vs. Grand Trunk Railway, 95 U. S., 43.* There the goods had been shipped from Liverpool to St. Louis in packages marked "P. & F. St. Louis." They were carried by the Grand Trunk Railway to Detroit, where they were destroyed by fire, under circumstances almost identical with the facts in the case at bar. A delivery was held to have been made to the connecting carrier. In the opinion of this Court it is there said:

> "At the time the fire occurred the defendant had no freight room or depot at Detroit, except a single apart-

ment in the freight depot of the Michigan Central Railroad Company. Said depot was a building several hundred feet in length, and some three or four hundred feet in width, and was all under one roof. It was divided into sections or apartments, without any partition wall between them. There was a railway track in the center of the building, upon which cars were run into the building to be loaded with freight. The only use which defendant had of said section was for the deposit of all goods and property which came over its road, or was delivered for shipment over it. This section, in common with the rest of the building, was under the control and supervision of the Michigan Central Railroad Company, as hereinafter mentioned. The defendant employed in this section two men, who checked freight which came into it. All freight which came into the section was handled exclusively by the employees of the Michigan Central Railroad Company, for which, as well as for the use of said section, said defendant paid said company a fixed compensation per hundred weight. Goods which came into the section from defendant's road, destined over the road of the Michigan Central Railroad Company, were, at the time of unloading from defendant's cars, deposited by said employees of the Michigan Central Railroad Company in a certain place in said section, from which they were loaded into the cars of said latter company by said employees when they were ready to receive them; and, after they were so placed, the defendant's employees did not further handle said goods. Whenever the agent of the Michigan Central Railroad Company would see any goods deposited in the section of said freight building set apart for the use of the defendant, destined over the line of said Central Railroad, he would call upon the agent of the defendant in said freight building, and, from a way-bill exhibited to him by said agent, he would take a list of said goods, *and would then, also, for the first time learn their ultimate place of destination*, together with the amount of freight charges due thereon; that from the information thus obtained from said way-bill in the hands of the defendant's agent, a way-bill would be made out by the Michigan Central Railroad Company for the transportation of said goods over its lines of railway, and not before.

These goods were, on the 17th of October, 1865, taken from the cars and deposited in the apartment of said building, used as aforesaid by the defendant, in the place assigned as aforesaid for goods so destined.

At the time the goods in question were forwarded from Montreal, in accordence with the usage in such cases a way-bill was then made out in duplicate, on which was entered a list of said goods, the names of the consignees, the place to which the goods were consigned, and the amount of charges against them from Liverpool to Detroit. One of these way-bills was given to the conductor who had charge of the train containing the goods, and the other was forwarded to the agent of the defendant in Detroit. On arrival of the goods at Detroit, the conductor delivered his copy of said way-bill to the checking clerk of defendant in said section, from which said clerk checked said goods from the cars into said section. It was the practice of the Michigan Central Railroad Company, before forwarding such goods, to take from said way-bill in the custody of said checking clerk, in the manner aforesaid, the place of destination and a list of said goods and the amount of accumulated charges, and to collect the same, together with its own charges, of the connecting carrier.

It is difficult to conceive a course of business more nearly identical with that disclosed in the case at bar.

In commenting on that case, and in applying the rule of law there laid down to the facts in the case at bar, his Honor, Judge Showalter, in his dissenting opinion in the Carr, Ryder & Engler case—that involving the through shipment of lumber to Alabama, (R. p. 362) says:

"It will be seen from the foregoing statement that on the course of dealing between the two carriers, *shipping directions had not been received by the connecting carrier.* The Court mentions the mark on the goods, but not as a

controlling factor in the decision. The Michigan Central Railroad Company did not look at the marks on the goods for the shipping directions upon which it acted. Under the mode of dealing between the two carriers, the case was the same as though there had been no marks on the packages. The goods were on the platform of the connecting carrier at the time of the loss. The defendant did not own or have any possessory right over that portion of the connecting carrier's station house. Defendant's servants were not privileged either to unload the goods there or to handle the goods afterwards. The servants of the connecting carrier placed all goods which were to be forwarded, as designated by the agent of the defendant, at a particular locality on the platform in question. The defendant ceased to be and the connecting carrier became the bailee of the goods—*and this before the shipping directions had been given by the one carrier to the other, according to the understood mode of dealing between them.* This was a case in which the defendant did not own or possess the unloading platform. If the defendant had owned or possessed that section of the station where the goods were unloaded, the mere placing of the goods in controversy at a particular locality on the platform, from which the servants of the connecting carrier would afterward, without special license from the defendant, take them, would not have changed the custody of such goods. The law upon this point is clear. Nor would the connecting carrier have become bailee even if its agent had received the shipping directions before the destruction of the goods. The fact that the goods were still in the custody of the defendant would, from the standpoint of the shipper, have determined the matter. I may add, that the Grand Trunk Railway Company had no terminal, that is to say, unloading facilities at Detroit, so far as concerned the owner of the goods in question. The section of the station in which the freight of the Grand Trunk Railway Company was unloaded, was owned and possessed by the connecting carrier. In the case at bar, the connecting carrier not only took exclusive possession of the cars in controversy at the terminus of appellant's rails, but hauled them to a point on its own rails to which appellant had, *neither in law nor by contract, even a right of access.*" (Italics ours.)

It must be remembered that the purpose for which the cars were delivered was not for further transportation on the original contract, *but for storage and re-sale*, and therefore no such strict rule as to delivery of way-bills is required. Opposing counsel admit that the consignees had interrupted their transit, and had agreed (*with somebody*) that the cars should be stored at East St. Louis.

(b) It was immaterial whether the Terminal knew the contents or fresh destination of these cars

Opposing counsel argue that the Terminal could not know the contents of these cars, their destination or who the consignees were, until it had received the new way-bill, and therefore it could not know whether it was holding them for the consignees. We have above made reply to this point and now add: If the Terminal had accepted them, would the fact that it did not know the consignee and the fresh destination, relieve it of the warehouseman's duty to care for them? Would either of those facts change the care and custody back to the receiver, or alter the liability of the Terminal, which attached the moment it accepted the cars? We hardly think a court of equity would release a carrier (which had *actually* accepted cars and taken them into its own exclusive custody) from liability for their care, simply because that

carrier had not yet been notified of the contents and destination. Courts of law have not even gone to that extent, as is shown in *Illinois Central vs. Smyser, 38 Ill., 354.*

But in point of fact, the Terminal company must have known from the first minute of its recorded relations to these cars, not only their contents, but also their destination. The vital fact, fully disclosed in the evidence above, that the Terminal had its "yard clerk" always on hand at the arrival of every train, to note and record the day, hour and minute of the incoming of each car; *each of which was covered by a separate way-bill,* (R. pp. 156, 157, 162) necessarily involved an inspection thereof, by which knowledge of contents and destination, including name of consignee, were all obtained. This conclusion is rendered all the more certain from the fact that such inspection would naturally have been made in order to show which cars were to be handled free, which were to be subject to the fifty cents charge for handling, which were to be sent on at once, and which were to be set to store. Way-bills are all kept together in the caboose at the end of each freight train, and we must assume that the yard clerks were at least ordinarily intelligent.

The record here shows that it was customary for the Terminal to take these cars and to hold them pending re-sale and a fresh destination. The consignees were expecting shipments daily, and for

the very purpose of having them stored so that they could inspect them for samples and until they could dispose of them, they entered into the agreement with the Terminal. The Terminal was to take these cars into custody as fast as they arrived, and were set to their tracks. After the consignees had sold the grain and were ready to give fresh destination, and make a new way-bill, they would be ready to move the grain, and consequently would have no further occasion to store it; the storage was between the arrival and the making by the consignee of a new way-bill; after that the service was carriage, and not storage.

(c) Issuing of way-bill was not necessary to constitute delivery.

It is another contention of opposing counsel that, notwithstanding the actual physical delivery into the exclusive custody of the Terminal, the receiver was responsible for the cars and contents up to the time the consignee issued a new way-bill for them and passed that way-bill on to the Terminal. Our reply here is that *at most* such way-bill is simply evidence of delivery, which may be shown by other competent evidence. Therefore, we insist, as held by the Court of Appeals, that it is wholly immaterial and technical to object, that prior to the fire no new way-bill had been passed over to the Terminal company.

No case can be found in which, for the purpose of delivery, it is held that a way bill is necessary, except where that way-bill is for the purpose of conveying to the connecting carrier information as to the further carriage, in which case always the old and not a *new* way-bill would be handed on. Here the cars were not delivered for further transportation under the original contract, but were for storage, and no ultimate destination could be given to them until the consignees had made a sale of the barley in St. Louis and re-consigned it. For any other purpose, at most, such way-bill is simply evidence of delivery and does not constitute the delivery, and therefore, if actual and physical de livery had been made it can be shown by other evidence. This is established in those cases in which goods are delivered to a railroad company to be held by them awaiting orders for transportation.

In the case of *Illinois Central vs. Smyser*, *38 Ill.*, *supra*, where goods had been placed in a car of the railroad company, with its assent, for the purpose of shipment, the loaded car being under the exclusive control of the company, the Court held that the goods thereby passed into the possession of the company as effectually as if they had been delivered in its warehouse. In that case the same contention was made as to bill of lading not having been delivered as in the case at bar. On that point the Court said:

> "It is not the mere signing of a bill of lading which transfers the possession of freight to the company, but it is evidence that they have received possession. Their possession may be shown by any other legitimate evi. dence."

And that the liability depends upon *actual* delivery, *irrespective* of way-bills or bills of lading, is well established by the decisions of this Court in:

California vs. Compress Co., 133 U. S., 387;
St. Louis Co. vs. Ins. Co., 139 U. S., 223;
Mo. Pac. vs. McFadden, 154 U. S., 155.

IV.

The agreement between the Peoria Company and the Terminal was not a lease or contract by which that company's rails were extended into East St. Louis.

Opposing counsel sought to meet the *prima facie* case of delivery thus made by the receiver, by construing the agreement which existed between the Terminal and the Peoria Company as a lease of the rails of the former to the latter, and upon this base their argument that the cars at the time of their destruction, were still in the possession of the receiver.

We desire to recur to the fact that the rails of the company terminated at a station called Bridge Junction, and did not extend south of the road marded "Stockyards Avenue" on the plat opposite page 100,

in the record. Opposing counsel have assumed from the statement in the first clause of said agreement, where the Terminal Association "undertakes to give the party of the second part terminal facilities at East St. Louis," that the company had no terminal facilities at the terminus of its line. This assumption is unwarranted by the facts. In connection with these shipments it was not considered necessary to show that the receiver had terminal facilities at the end of his line, since they were not expected to be handled in the receiver's yards at the terminus of his rails, but from the first were intended to be "set to" the tracks of the Terminal as the designated place of delivery for storage for the benefit of the consignees. Therefore, no direct evidence of terminal facilities was introduced. However, by a reference to the "plat of railway yards" in this record (R. p. 100) it will be seen at the bottom of the plat, and toward the middle, the beginning of yards marked "J. S-E. freight yards."

"J. S-E" was the common name by which the railway operated by the receiver had theretofore been known. (R. p. 18.) This identity is also shown by the fact that the line of railway belonging to the Peoria Company is designated on this plat as the "Jacksonville Southeastern R. R." These "J. S-E. freight yards" are referred to and identified by the testimony of Roederer (R p. 69), of Phelps (R. p. 74), and of the receiver himself, (R. p. 222). Opposing coun-

sel tried hard to get him to say that he had no terminal facilities, but did not succeed. Therefore, this agreement was not entered into for the purpose of supplying any deficiency in the line of railway which the receiver was operating, or to enable it to comply with its common law obligations as a carrier.

The written agreement between the Terminal and Peoria Company was simply for the purpose of securing a certain and definite rate to be paid to the Terminal for switching through cars to and from the rails of the Peoria Company and other companies in the vicinity of East St. Louis, and to provide beforehand for the ample and quick handling of such through freight, so that the company's own proper terminal facilities would not become clogged or over-taxed by the accumulation there of such through freight in addition to that which was purely local and destined only to and from East St. Louis.

In this connection it is well to consider the nature of the railroad of the Terminal Association, and the character of the business that it solicited and carried on. By a glance at the plat (R. p. 100) it will be seen that the rails of the Terminal connect with all of the many railroads entering East St. Louis; this taken with the name of the Association, points directly to the fact that it is a switching railroad, which serves all other railroads centering in East St. Louis, by delivering cars from one to the other.

As a matter of fact, it could have been shown that the Terminal Railroad Association has the same sort of an agreement with every other railroad entering East St. Louis, as it had with the Peoria Company. Its business with the Peoria Company was part only of its general storage and connecting line business, and all on the same basis, with control of future transportation and "bridge toll" for its motive.

Unless, therefore, it can be said that the mere fact of the Terminal Association being a switching railroad, whose main business is simply the switching of cars from one railroad to another, prevents it from assuming the character and liability of a connecting carrier for the cars while they are in its possession and custody in the course of such transportation from one railroad to another, then, we submit, that the existence of such an agreement as that of August 1, 1892, does not in itself change the relations between the Terminal Association and other railroads from which it receives cars.

In *Missouri Pacific R. R. vs. Grocery Co. 55 Kan. 525*, we find a logical statement of the reason why the mere fact that a railroad is a switching railroad does not relieve it of the liability of a common carrier. In that case a car load of sugar sent from Louisiana was consigned to the plaintiff, a grocery company at Wichita. It was shipped over the Texas & Pacific Company's line and was brought to Wichita by the St. Louis & San Francisco Company. It was there placed on the

"Y" and switched by the defendant company over its tracks to the spur tracks in the rear of the plaintiff's warehouse, for which service the St. Louis & San Francisco Company paid their regular switching charge of two dollars per car. The Court held that the defendant was liable as a common carrier for a loss occurring after it had taken charge of the shipment, and before the plaintiff had had a reasonable time in which to remove it; among other things saying:

> "A railroad transporting a passenger or a car load of freight one mile, using a switch engine for motive power, is just as much a common carrier as if the distance were a thousand miles by regular freight or passenger train. The fact that compensation for this particular service was paid by the St. Louis & San Francisco Railroad Company, while it might render that company also reeponsible, it could not relieve the defendant company from its liability as a carrier."

To sustain the contention of our opponents that the agreement of August 1, 1892, excluded the relation of connecting carrier between the two companies, or that the contract itself made them respectively principal and agent as to the interchange of all traffic between them, it is absolutely necessary to ignore the fourth provision of the contract, which is (R. p. 100-101):

> "Fourth. All cars consigned to and from the East St. Louis freight house of the party of the second part, to be switched to and from the Wiggins transfer tracks without extra charge. Regular switching charges and rules to apply to all other cars to and from connections, the party of the first part to be governed in making its

collections by instructions shown on bill to it, as to who should pay. In the absence of any instructions the switching charges will follow the car.

This clause expressly recognizes and provides for that interchange of traffic which occurs between connecting carriers, and by it provision is made that the regular switching charges and rules shall apply on all cars, to and from connections; that is, that the regular switching charges shall apply to certain cars which necessarily had to pass over the tracks of the Terminal to the tracks of other railroads connecting with the latter.

Now, it is to be remembered, that this contract does not provide that *certain* yards or *any special* place or territory in the yards of the Terminal are to be set aside for the *exclusive* use of the Peoria company, *in the sense that it was to exercise any dominion over or have any possessory right therein.* Nor does the evidence, in fact, show that any particular portion of the yards were set aside for the *exclusive* use of the Company or its receiver.

John Weidmer, of the Gratiot Street Warehouse Company, testified, as shown above, that he rented of the Terminal Association a warehouse which was right in the middle of that part of the Terminal's yards, which opposing counsel refer to as the appellant's "portion" of these yards; that some of the tracks ran through the warehouse; and that he rented

it from the Terminal for the storage of bailed hay, on the understanding that it had full control. (R. pp. 196, 197.) This was the "dangerous fire-trap" referred to by the Master, and in which the fire originated. (R. p. 60, 23, "Ex. 3," 236).

The servants of the Terminal Association may have been accustomed to haul cars from the designated "Ys" to some special territory in its yards, and that territory for the time the cars stood thereon may have been "the yards set aside for the use" of the receiver, within the sense of the second section of the contract, *but such servants did not do this by any direction from the receiver;* nor was any right in him to direct or control them, or to designate the place on the grounds or rails of the Terminal where any car received from his road should be at any given time, in any way recognized. (R. pp. 104, 186.) Judge Showalter very accurately says of these yards that the receiver "had, neither in law nor by contract, even a right of access." (R. p. 363.) *This also was the construction given to the contract and acted on by all parties.*

The agreement will be searched in vain for words of conveyance. There cannot be found in it any transfer from the Terminal to the company of any estate in the grounds or tracks, or any part thereof, or of any possessory interest in its engines, or control over its servants.

The conduct of the Terminal Association at the very fire which caused this great loss, emphasizes the absence of any attempt on the part of the Terminal to make any such transfer by this agreement. As soon as the fire broke out, the receiver had an engine close by on his own rails, and his employees attempted to go in and hitch on to these cars and pull them away from the burning warehouse, but were rudely prevented from so doing by the employees of the Terminal (R. p. 179). The evidence further shows that while a great many of the cars which came off of the receiver's road were set on to certain tracks by the Terminal Association, yet it further shows that this was not always the case, and that the Terminal would take the cars into its own exclusive custody and store them in any part of its vast yards which was most convenient to it, and there mingle them with cars from other railroads, and that, after the Terminal had taken possession of such cars on the designated "Ys," the receiver could in no manner direct the point to which they were to be transported or stored on the rails of the Terminal. (R. pp. 183-6). In fact, as shown by the evidence, cars from other railroads were, at the time of the fire, standing on these same tracks, claimed to have been set apart for the exclusive use of the receiver. (R. p. 197). In other words, the evidence conclusively shows that the receiver had no exclusive use, direction or control over any portion of the Terminal yard.

Therefore, we earnestly submit that the contract in question was only the result of precautionary measures on the part of the Peoria Company for the prompt and adequate handling of *through* freight by its connecting carrier, the Terminal, and *beyond this* was nothing more than *a division of the freight charge between the two connecting carriers*. The cars in controversy were not handled by the Terminal by reason of that contract; the only compensation it was to receive for such cars was the regular tariff to be paid for the new haul, in which it was to be the initial carrier. His honor, Judge Showalter, in his opinion, held (R. p. 359):

> "As said above, the shipper pays no more than if the appellant had himself owned and operated the lines of the Terminal Association. Such a contract could not interfere with or modify the legal obligation of either carrier to a shipper whose goods are handled successively by both. Neither appellant nor the Terminal Association could evade or alter any legal obligation to a third party by any contract between themselves. If the Terminal Association had alienated to appellant an actual ownership or possessory right over that portion of its tracks where the cars in controversy were destroyed, and such a control over its employees and engines that said employees, when engaged in handling the cars in question, were the servants of appellant, and the engine used by them his engine for the time being, the case would be different. On this hypothesis, the tracks where the cars were destroyed would have been appellant's tracks, the employees who hauled the cars to that point his servants, the engine used by them his engine, he would have continued to be the bailee of the property, and the matter of way-bills or junction reports would have signified nothing. But in my judgment, as said, *the contract in question had no force as of alienation* by the Terminal Asso-

ciation to appellant of any possessory right, interest or estate in or over any property of the former company, or of any control over its servants. Neither the relation of lessor and lessee, nor that of licenser or licensee, existed between these parties as resulting from said contract, so far as it concerned the cars and contents in question."

V.

The agreement between the Peoria Company and the Terminal did not make them principal and agent.

It was also argued in the courts below that the agreement of August 1, 1892, between the Terminal and the Peoria Company, made the former the agent of the latter. In the opinion of his honor, Judge Jenkins, it will be seen that he, also, is inclined to this view.

From an inspection of this agreement (R. p. 100) it will be found that the Terminal only agreed to furnish necessary yard room and track facilities in their yards at East St. Louis, for the purpose of handling such freight as might originate on the line of the Peoria Company, or be received by that railway company from other lines, to be carried to St Louis, or points beyond St. Louis, over the rails of the Terminal. For this service the Terminal was to receive the customary charges for the handling of each car, just as any other connecting carrier would receive.

A case quite analogous to the one at bar, is *St. Louis Insurance Company vs. St. Louis, Vandalia, Terre Haute & Indianapolis R. R. Co., 104 U. S. 146.* There this Court held that an arrangement between a Dispatch Company and sundry railroad companies, whose lines terminated at New York, whereby the latter, separately, agreed to carry all goods for the transportation of which the former should contract, at the established tariff rates, did not involve a joint liability on the part of the railroad companies, nor make the Dispatch company the agent of the railroad companies, the Court saying:

> "The Dispatch company and the defendant had, it is true, certain business relations, but those relations did not necessarily involve an agency upon the part of the former for the latter, in the making of contracts for transportation. The agreement between those companies only bound the railroad company to 'receive, load and unload, deliver and way-bill' such freight as was sent to it by the Dispatch company, and at the rates established, not by the latter, but by the defendant and other railroad companies."

To the same effect is *Mo. Pac. vs Grocery Co., 55 Kas., supra,* where the switching railroad was held to be a *connecting carrier* and not an agent.

So, we submit in the case at bar, that the agreement between the Peoria Company and the Terminal only bound the latter to properly take care of and handle all freight which the former might deliver to it on the designated "Y's" and at the rates established, not by the receiver, but by the Terminal.

It might as well be argued that every railroad company which enters into an agreement with a coal company to furnish it so many cars a day, and to haul those cars at a certain price, thereby becomes the agent of the coal company, or thereby leases to it the cars and that portion of the rails necessary to make the haul contemplated.

(a) **The receiver did not pay the Terminal for storing these cars.**

Opposing counsel predicate their "theory of agency" existing between the receiver and the Terminal, as to the handling of these cars, on the unwarranted *assumption* that the receiver paid the Terminal, fifty cents a car. We quote from the petitioner's brief (p. 24):

> "The Terminal company, therefore, acted merely as the *servant or agent* of the receiver in breaking up his trains and placing the cars on certain tracks for which it received from the receiver fifty cents a car. *One railway company does not pay to another railway company fifty cents a car for the privilege of delivering cars to it.*"

The fact that their own witness (R. p. 79) testified that this service of making and breaking trains was a "separate and distinct service" from the storage, and the further fact that no loss occurred during the "breaking" of the trains, or by reason of its negligent performance, renders the matter wholly irrelevant and immaterial, and we submit that there is no basis in this record for the *assumption* that the

appellant paid the Terminal fifty cents a car for these cars. Especially is this so in view of the provision in the contract, that all cars paying bridge toll were to be handled free.

Mr. Phelps testified (R. p. 74) generally that this work was done under a contract at fifty cents per car. The contract referred to (R. p. 100) provides that the work done shall be:

> "at the rate of fifty cents per loaded car in and out, *except cars on which the party of the first part receives a bridge toll, which will be handled free.*"

If, as contended by opposing counsel, all these cars were destined to St. Louis, every one of them would be cars "on which the party of the first part" (the Terminal) would receive a bridge toll, and, in consideration of its receiving such toll, *and not in consideration of payment by the receiver*, the Terminal stored and handled these particular cars. Was, then, such storing and handling, by the Terminal, *for itself*, or as agent of the receiver?

Clearly for itself, as principal. Precisely as it solicited the hay business of Weidmer. And for the same reason that it solicited and secured this business from the grain brokers in St. Louis, solely to prevent its coming down on the west side of the river, or being delivered to the Wiggins Ferry Company, its competitor at East St. Louis, in which events it would have received no toll. (R. p. 239.)

The bridge toll, and the control for purposes of "future transportation," was ample consideration, as we have elsewhere said, for the promise to keep safely, and made them, on their own immediate responsibility, bailees for hire. They were responsible from the moment of the receipt of the cars. *Ducker vs. Barnett, 5 Mo., 97; Turner vs. Huff, 46 Ark., 222.*

VI.

The same rules of law apply as well to cars as to contents.

Opposing counsel say that the claim for the cars destroyed rests on a somewhat different ground than do the claims for barley destroyed. They state the rule correctly as to the system of car book-keeping, and also that where a car has been delivered to a connecting carrier, until such delivery *is so reported*, the car shall stand *charged* to the company last reported as having received it. But there is no agreement between railroads by which a mere *charge* of this kind can *create and establish a liability* for the car. We take it that counsel hardly meant to assert such a proposition. They do, however, further state that if a car is destroyed while on the tracks of that company, such company shall be liable therefor the same as it would be for any other property. To this we assent, because it merely states a well known rule of law.

We therefore submit that the argument of opposing counsel, that there is a liability in the receiver for these cars simply by reason of the fact that there was a failure to *notify* the St. Paul Company of their delivery to the Terminal, and therefore that the St. Paul Company on their car books still had the receiver *charged* with them, is by no means tenable.

If this were so, liability could be created and divested by a simple means of book-keeping, *without ever moving a car a foot.* We know that opposing counsel would not agree if, even in this case, the receiver had sent in a report that these cars had been delivered to the Terminal, that therefore the receiver was relieved of all liability, and that liability was vested in the Terminal.

This is but an argument based upon constructive delivery of the cars by junction reports, and the freight by way-bills. The danger of adopting such a theory is at once apparent, since if it is held that delivery depends upon the issuing of junction reports, and if no junction reports have been issued, no delivery has been made, then a railroad company could divest itself of liability by merely issuing such reports, although, in fact, it had not delivered the cars. The question of liability, both as to cars and freight, is the same, and depends upon the actual possession.

The Supreme Court of Illinois held, in *Peoria Ry. vs. Chicago Railway, 109 Ill., 135*, that a carrier of cars holds the same relation to the cars as it does to the freight, and on the oral argument of these cases in the Court of Appeals, opposing counsel assented to this principle, and we find this case cited in their original brief filed in that court, and in this court.

In *Railway Company vs. Railway Company, 123 Ill., 594*, it is expressly held that if cars had been set on the private delivery track belonging to the consignees, for loading or unloading, then they are in the possession of the consignees, and consequently its liability is interrupted during the time they are so out of its possession. These cars were set on the tracks of the Terminal Association out of the possession and control of the receiver and for the purpose of storage, awaiting a fresh destination from the consignees by express agreement between them and the said Association. The case cited originated at East St. Louis, and seems much in point, not only as to cars, but also as to contents.

In the case of *Peoria & Pekin Union vs. Rolling Stock Company, 136 Ills., 643.* confirming *Connecting Railway Company vs. Railway Company, 123 Ills., supra*, the reasoning of the opinion is so potent, and so applicable to the cases at bar, that we refer it to this Court with confidence. There a transporting company delivered loaded cars to a terminal and switching com-

pany, to be set for unloading on tracks of the latter adjacent to the warehouse of the consignee. After the cars were unloaded by the consignee, the terminal company was to return them to the transporting company. While standing on the tracks of the terminal, adjacent to the consignee's warehouse, the cars were destroyed by fire.

In reversing the judgment of the lower court, holding the terminal company liable for the cars, the Supreme Court (p. 651) says:

> "Having nothing to do with the unloading, and having delivered the cars on the track at the refinery, its whole duty as a common carrier of the freight contained in the cars was at an end. The transit of the goods had terminated, and the cars on the track were so far delivered into the control of the refinery as to enable it to discharge the freight. * * * Appellant *had no control of the time such cars should remain* at the refinery for such purpose—*that*, it would seem from the course of business, *was in the discretion of the consignee of the freight.*
>
> * * * * * * * * *
>
> By the terms of the contract of carriage, the control of the goods ceased absolutely by the delivery to the consignee on the track, and was suspended, *as to the cars*, for an indefinite period, the duration of which was to be determined, *not by appellant, but by the consignee of the goods.*"

The cars here involved were also, according to the established course of business, set to tracks selected by the consignees, although not for unloading, but nevertheless to await a sale of contents by the consignees, and a new consignment under a new and independent contract of carriage, and, therefore, just as

much for the convenience and benefit of the consignees. The receiver "had no control of the time such cars should remain" on such tracks, since that was absolutely "in the discretion of the consignee of the freight." We confidently submit that this case would be conclusive in our favor if the cases were pending in the same court.

VII.

The opinions of the majority of the Court of Appeals are not opposed to each other.

It was alleged by the petitioners as a reason why *certiorari* should be granted, that the opinions of the majority of the Court of Appeals are not entitled to any strong presumption of correctness because they are opposed to (1) each other, and (2) to the opinion of the District Judge in the Circuit Court.

We do not believe, however, that a consideration of the opinions delivered by Judges Woods and Showalter, the two judges constituting the majority of the Court of Appeals, will sustain the assertion that they are opposed to each other.

It is to be remembered that in the two lower courts four appeals were submitted and considered together. These appeals, by stipulation, covered many other cases pending in the Circuit Court. The four

cases submitted to the Court of Appeals presented two classes of shipment—the three involved in this discussion were barley shipments consigned to St. Louis brokers to be sold on "change," and the fourth case was a through shipment of merchandise destined to Alabama.

The major part of the opinion of Judge Woods consists in a consideration of the three cases of barley shipments, and he, with the full support of Judge Showalter, reverses the decree of the Circuit Court which held the receiver liable for such shipments, on the ground that a certain agreement, quoted above, had been entered into between the consignees and the Terminal Association, whereby the latter was to hold these barley shipments on its rails in East St. Louis for the purpose of giving the consignees an opportunity of selling the same in the market, and thereafter give to the shipments a new destination. As to the other, Carr, Ryder & Engler case, involving a through shipment of merchandise, Judge Woods simply held that inasmuch as said agreement did not have any application to it, the decree of the Circuit Court should be affirmed.

The major part of the opinion of Judge Showalter consists in a consideration of the liability of the receiver in the case of this through shipment, and in demonstrating that the agreement of August 1st, 1892, entered into between the Terminal and the Peoria

Company did not constitute a lease of the rails of the Terminal, nor make the Terminal the agent of the receiver, in opposition to the position taken by Judge Jenkins (not Judge Woods) that said agreement did accomplish such object.

The only opposition in the opinions of Judges Woods and Showalter is in the disposition of the Carr, Ryder and Engler case—Judge Woods being of the opinion that the receiver was liable, and Judge Showalter that he was not liable. That case, however, is not before the Court on this hearing.

But in our brief therein we endeavored to show, and we hope to the entire satisfaction of this court, that Judge Showalter was right, both on authority and fact.

In the consideration of these points it must always be borne in mind that two different classes of cases were disposed of. On the barley question we have Judges Woods and Showalter concurring and constituting a majority, and in the through shipment case, we have Judges Woods and Jenkins concurring, and therefore constituting a majority.

VIII.

The decision of the Court of Appeals herein is not in conflict with other decisions.

As another ground for reversal, opposing counsel contend in their brief that the decision of the Court of Appeals in this case is in conflict with:

Pratt vs. Railway Co., 95 U. S., 43.

Covington Stock Yards Case, 139 U. S., 128.

Texas & Pacific Ry. Co. vs. Clayton, 51 U. S. A., 676.

Mt. Vernon vs. Alabama Ry., 92 Ala., 296.

Palmer vs. C., B. & Q., 13 Atlantic Reporter, 818.

The decision in the case at bar is: (1) that where barley shippers consign car loads of barley to commission merchants without notifying the railroad company that they, the shippers, are still the owners, the consignees have the right to change the original destination of the shipment; (2), that where the consignees enter into an agreement with a terminal railroad, by which the latter is to receive such barley shipments from a carrier and hold them in free storage for the convenience of the consignees, and until the latter shall make sales of such barley on a grain exchange, there has been a sufficient delivery of such shipments by the connecting carrier to the Terminal

railroad, when, pursuant to custom, the connecting carrier deposits such cars on certain designated "Y's" of the Terminal and the latter takes exclusive physical possession and control of such cars by attaching its own engines to them and hauling them to a point on its own rails, there to await the convenience of the consignees.

In *Pratt vs. Railway Company, supra*, this Court expressly recognized and announced the principle that where by custom or agreement there is a designated place of deposit between two connecting carriers, delivery is made by such deposit, although shipping directions had not as yet been delivered from the first to the second carrier.

The *Covington Stock Yards case, supra*, involved, as we have fully shown above, a controversy entirely different from the one at bar. Judge Showalter also said of this case (R. p. 359):

> "In the *Covington Stock Yards case, 139 U. S., 128*, it was ruled, in effect, that a carrier bringing cattle to a consignee who had provided himself with structures connecting his yards with the railroad track, whereby cattle might be unloaded directly from the cars into his yards, could not refuse to unload the cattle of such consignee into the yards, and by means of the appliances provided by him, for the mere purpose of compelling him to pay a terminal fee at the cattle yards provided by the company, or provided by an independent corporation. This case, as I can see, has not here the application or significance suggested by counsel for appellees. Of the cars in question, one was to go to Birmingham, Alabama, the others, loaded with barley, to different points in and

about St. Louis, as directed by the consignees. Appellant did not engage to furnish unloading facilities for these cars. He was under no obligation to these appellees to provide terminal facilities for unloading. He handled the cars of freight as an entirety."

To this we desire to add the further suggestion, that the receiver not only did not engage, nor in any way was such obligation upon him, to furnish unloading facilities for these cars, but from the very nature of the business, it was never intended that these cars should be unloaded in the yards of any railroad. They were barley, consigned to commission brokers, who sold them on "change" to brewers and other consumers, to whom the cars would be dispatched, and in whose malthouses they would be unloaded.

The case of *Texas & Pacific vs. Clayton, supra*, is in perfect harmony with and follows that of *Pratt vs. Railway Company, supra*, and therefore, we submit, is also in harmony with the decision of the Court of Appeals in this case. There the Court says:

"It may be safely affirmed as a proposition applicable to all the cases, that a deposit of the goods, with notice *expressed or implied*, at any place where the second carrier has control, conformable with the usage created by the course of business between two carriers, is a sufficient delivery and discharges the first carrier."

This is the exact principle which the Court of Appeals applied to the facts in the case at bar.

In *Mt. Vernon vs. Alabama Southern R. R., supra*, the Alabama court holds that there can be no delivery

from one connecting carrier to another, unless the second carrier has received full shipping directions. This, no doubt, is the general rule. We submit, however, that, even if the court in that case had had an opportunity to pass upon the exception to the rule, which is founded on agreement and custom, and had directly refused to have held that a deposit of freight pursuant to custom and agreement by one connecting carrier on the premises and within the physical possession and custody of the other, was a sufficient delivery to have transferred the carrier's liability, any such decision would have been in direct conflict with that of this Honorable Court in *Pratt vs. Railway Co., supra*. The Court of Appeals in this case would then have had to render a decision either in conflict with the Supreme Court of Alabama, or with the Supreme Court of the United States.

We have not the case of *Palmer vs. C., B. & Q., supra*, before us, which opposing counsel contend conflicts with the decision in the case at bar. However, for the purpose of this argument, we may concede all that opposing counsel contend for as to such conflict, and the Court of Appeals would only have found itself in the same predicament as to choosing between a decision which is in conflict with a State court, or one which is in conflict with the Supreme Court of the United States.

IX.

The original consignees are alone entitled to bring suit.

The claims for the loss of these goods are all presented by the original consignors. Our contention is that if any liability exists, either as warehouseman or carrier, by the receiver or the Terminal Association, such liability is to the original consignees, and not to the original consignors.

(a) The right to possession is in the consignee.

In the claims of the interveners, Jacob Rau and Henry Rippe, the shipments were made to the Orthwein Grain Company, for sale on commission (R. pp. 291, 302). The carrier, however, was not informed that the Orthwein Grain Company (consignee) was not the owner (R. pp. 293, 303). Under the contract of carriage the consignee was entitled to possession and alone is entitled to sue.

In *Hardy vs. Monroe, 127 Mass., 64*, it was held that one who consigns goods to another to be paid for only as they are sold by him, has not such immediate possession or right to immediate possession as will support an action of tort for the conversion of the goods. The court there said:

"The uncontradicted evidence was that the goods alleged to have been converted were consigned by the plaintiff to one Harvey, to be paid for only as they were sold by him. This gave the legal possession of the property to the consignee.

Fairbanks vs. Phelps, 22 Pick., 535."

The uncontradicted evidence in these two cases is that the goods were consigned to the Orthwein Grain Company to sell on commission, with no understanding as to when they were to be paid for.

(b) Where the consignor has parted with his interest in the goods, and the actual owner is the consignee, the latter alone is entitled to bring suit.

In the claims of all other (than Rau and Rippe) interveners, the barley shipments were made pursuant to telegraphic correspondence between the interveners and the consignees. This correspondence constituted a bargain and sale, and by it the interveners parted with all their interest in the barley upon delivery to the initial carrier.

There is abundant authority to sustain the doctrine that, where the consignor has parted with his interest in the goods, and the actual owner is the consignee, the latter alone is entitled to bring suit.

Blum vs. The Caddo, 1 Wood, 64.
Griffith vs. Ingledew, 6 S. & R., 429.
Potter vs. Lansing, 1 Johnson, 215.
Greene vs. Clarke, 12 N. Y., 343.

Krulder vs. Ellison, 47 N. Y., 36.

Canfield vs. Northern Railway Co., 18 Barbour, 586.

Gwyn vs. Richmond Ry. Co., 6 Amer. Eng. R. R., 452.

Everitt vs. Sautes, 15 Wendell, 474.

S. & N. Alabama Ry. Co. vs. Wood, 72 Alabama, 451.

Denver Ry. Co. vs. Frame, 6 Col., 582.

Dunlap vs. Lambark, 6 Cl. Fin., 600.

Dutton vs. Solmonson, 3 B. & P., 582.

Dawes vs. Peck, 8 T. R., 330.

Distillery vs. Railway, L. R., 7 H. L., 269.

King vs. Meredith, 2 Camp., 639.

"As a general rule, the consignee is considered the person *prima facie* entitled to sue for loss or injury to goods shipped, as the law intends that by delivery to the carrier the title to the goods vests in the consignee."

3 Ency., Pleadings and Practice, 829.

Authorities cited in note 3.

"Where goods are sent by vender to vendee, the delivery of them to carrier usually vests the property in the latter, and he is the person to sue the carrier for them."

Fragrano vs. Long, 4 Barn & C., 219.

Stanton vs. Eager, 16 Pick., 469.

Brown vs. Hodgenson, 2 Camp., 36.

Abbott on Shipping, 326.

"The mere fact that the person is named as consignee in a bill of lading is such presumptive evidence of ownership in him, in the absence of any showing to the contrary as will entitle him to sue."

3 Ency., Pleadings and Practice, 830.

Lawrence vs. Minturn, 17 Howard, 100.

Butler vs Smith, 35 Miss., 457.

Griffith vs. Ingledew, 6 S. & R., (Pa.) 429.
Arbuckle vs. Thompson, 37 Pa. State, 170.
Blanchard vs. Page, 8 Gray, (Mass.) 289.
Harrison vs. Hixon, 4 Blackfd, (Md.) 226.

Touching this question, the Supreme Court of the United States, in *Grove vs. Bryan, 8 Howard, 429*, said:

> "The effect of the consignment of goods generally is to vest the property in the consignee; but if the bill of lading is special to deliver the goods to A for the use of B, the property vests in B, and the action must be brought in his name in case of loss or damage."

It is definitely settled in Federal Courts that an action for loss or damage must be brought in the name of the party in whom the title to the goods is vested.

Again, in *Lawrence vs. Minturn, 17 Howard. 100*, the Court said:

> "The first question to be determined is whether the libellant had the right to sue in his own name."

After discussing the facts in evidence, the Court proceeds:

> "Upon the proof, we are of the opinion that the libellant had a right to sue the carrier in his own name. He is the consignee named in the bill of lading, and in the absence of evidence to the contrary, the property is presumed to be in him. In *Evans vs. Marlett, 1 Lord Raymond, 271*, it is laid down that, 'If goods by bill of lading are consigned to A, A is the owner and must bring the action against the master of the ship if they are lost, but if the bill be special, to be delivered to A, to the use of B, B ought to bring the action.'

"Whether it be strictly correct to affirm that in the case first put, A shall have the right of action against the carrier; though in point of fact he is only an agent for the consignor, has been much controverted. In *Griffith against Ingledew, 6 S. R., 429*, goods were shipped by A for his own account and risk, but deliverable under the bill of lading to B or his assigns. The previous decisions were examined with great care. There was a difference of opinion on the bench. *Mr. Justice Gibson dissenting.* But the majority of the court held that by force of the bill of lading the legal title was in the consignee, and he should maintain the action.

"Since that decision was made, the question has been much discussed both in this country and in England. It is not easy to reconcile the decisions. We shall not attempt to do so here: the case does not require it, for, if we take the rule to be that an action against the carrier cannot be brought by a consignee who has no beneficiary interest in the goods, it still remains true that the presumption of such an interest in the consignee arises from a bill of lading which makes the goods deliverable to him or his assigns."

In the case of *Merchant's Dispatch vs. Smith, 76 Ill., 542*, the court said:

"The first point relied upon by appellant is that the consignee of the goods could not maintain a suit for the loss; that the action should have been brought in the name of the consignor. Where goods are consigned without reservation on the part of the consignor, the legal presumption is the consignee is the owner. *Angel on Carrier, Sec. 497.* This Court held in *Diversy vs. Kellog, 44 Ill., 114*, that when goods were delivered to a carrier under a contract of sale, the title to the property vests in the consignee, subject to *stoppage in transitu*, but with no other lien unless expressed in the terms of the sale. We are therefore of the opinion that the title to the goods shipped was in appellees, and the suit for the loss was properly instituted in their name."

The only attempt made by opposing counsel to avoid the conclusion which inevitably follows from the foregoing adjudications, is an argument to the effect that the bargain and sale was for delivery in St. Louis. Some of the correspondence between the intervener, the Huntting Elevator Company and the Teichman Commission Company, is quoted and relied on to support their contention. The only telegram which contains any reference to delivery at St. Louis is one from the Elevator Company to the Commission Company asking for best bid on barley. This was dated Sept. 20, 1894, and there is nothing in the record to show that any response was made to it, much less that *any* barley was sold pursuant to it (R. p. 301). To make a showing opposing counsel are compelled to stretch their imagination far enough to attribute a *telegram* sent *twelve* days later as a reply. (Petitioners' Brief, p. 61).

If, however, the sale was originally made for delivery at St. Louis, this very consignee, having the right to change the point of delivery, did change it to the yards of the Terminal Association at East St. Louis, where these particular shipments had been received and were held in storage for the convenience of the consignee at the time of fire. (R pp. 239, 240, 241).

In this same connection opposing counsel seek to sustain the right of action in the consignors, by an

attempt to show that the title to the grain had not passed to the consignee at the time of the fire. In the Huntting Elevator case they argue that the intention of the parties is clearly apparent, and by reason of the fact that the consignee compelled the consignor to replace the lost barley, that both parties treated this barley as belonging to the consignor until it reached St. Louis.

Undoubtedly the intent of the parties, as to when the title passes, will control, *provided* that intent is in any manner expressed in the contract *made at the time of the transaction*. If the intention is *not* clearly expressed then the court will apply well settled rules of interpretation. The correspondence between these parties, which is the only contract in existence, will be searched in vain for one word by which it could be construed into a *conditional* contract. Not a word is found by which the seller could be compelled to deliver the barley at St. Louis. The nearest approach is the use of the words "to be *shipped* to us here"—*not* "to be *delivered* to us here," and "via East St. Louis," which appear in but two instances. These were mere shipping directions, and were so considered by the parties *at the time*. Teichman wires Gilchrist & Company: "Route shipments via East St. Louis, * * * * * " to which Gilchrist replies: "Shipping directions received, etc.,"

and again Teichman wires Gilchrist: "Accept five thousand more, fifty-six net, same shipping directions." (R. p. 289, also 325).

Therefore, we submit, that there was no condition precedent for delivery at East St. Louis, but that the title to the barley passed to consignees upon delivery by the consignor to the initial carrier. Opposing counsel ignore the fact that the intent of the parties, which controls, is the interest which was manifested when the transaction occurred, and seek to apply the principle to facts indicating an interest subsequent to the loss.

We submit that after the contract had been executed, and after the relation of warehouseman had been created, by the acts of the parties thereto, between the consignees and *either the receiver or the Terminal*, rights of a third party had intervened, and it was impossible thereafter for the parties to the original contract to alter the same so as to enable one of them (the consignor) to hold the third party as a carrier, when otherwise the third party would only be liable as a warehouseman, and then only to the consignee.

In view of the decision of this Honorable Court in *Railroad vs. Knight, 122 U. S., supra.* where, under very similar circumstances, it was held, because of the relation of warehouseman existing between the

railroad and one of the parties to the shipment, the other party to the shipment, who had sued the railroad as a carrier, could not recover, because the facts in the case showed simply a liability as a warehouseman to the first party to the shipment, it becomes very material, therefore, that the question of ownership should be strictly determined.

The intention not being clearly expressed in the contracts, we submit that, construed by the well settled rules of interpretation, the title had passed to the consignees, and whoever held the goods at the time of the fire, held them for the consignees as warehouseman, and these suits cannot be maintained.

CONCLUSION.

At the conclusion of opposing counsel's brief filed in the application for *certiorari*, an appeal is made to this Court, based on their own bad judgment in suing the wrong carrier. Citing the predicament of Bromley in *Midland Ry. vs. Bromley*, 8 *J. Scott*, 372, and as usual charging his last sad plight to the Court and not to the error of his counsel, they ask this Court, solely for the purpose of saving their clients, to unjustly charge the receiver with the loss. If they have deliberately turned their back upon a plain, well defined and highly equitable right of action against

the Terminal Railroad Association, through whose gross negligence the loss was occasioned, and which right of action still exists, and in the end find themselves in Bromley's condition, surely, they have nobody but themselves to blame.

The Court will not, however, look in vain for the motive which impelled counsel to select for an opponent in these suits the receiver, representing a small bankrupt railroad, instead of the Terminal Association, a large and powerful corporation, virtually controlling all entrances to St. Louis, and capable of hitting back in the most vigorous way. From the beginning of this litigation, the record shows assiduous and deliberate co-operation between the Chicago, Milwaukee & St. Paul Railway, the one *prima facie* liable as the initial carrier, and the Terminal Association, clearly liable as the carrier upon whose rails and through whose gross neglect the loss occurred, for the inequitable purpose of imposing the liability on this respondent (R. pp. 97, 126, 170).

Upon reference to the many "Station Receipts" and "Bills of Lading" introduced in evidence by the initial carrier and principal intervener, the St. Paul Company, in its own behalf and in behalf of the other interveners, its immediate patrons, it will be at once seen by the Court that it will be impossible to hold the receiver, liable either for the loss of the St. Paul

cars, or for their contents, unless the Court ignores, utterly, the very conditions which the St. Paul Company sought, in the first instance, as the initial company in a through route, to impose upon its own shippers, the other interveners, and permits it, as against a subsequent carrier, to repudiate every rule and express stipulation uniformly laid down by it for the limitation of its own liabilities.

The initial carrier, as forwarding agent of the consignors, had power to bind the latter.

5 Am. & Eng. Ency., 2 ed., 408.

These "conditions and rules," purporting on their face to be part of every contract of through carriage, were in every "receipt" and "bill" passed on with the freight in transit, by the St. Paul Company, over the signature of its agent, to connecting lines. They are as follows:

STATION RECEIPTS AND WAY-BILLS.

"Received from W. W. Cargill Co., bulk barley, * * * to be transported by the Chicago, Milwaukee & St. Paul Railway Co., over the line of this railroad to their warehouse at....., *ready to be delivered* at said warehouse to the consignee or owner, and if the same are consigned to any point beyond the line of this company's road, *ready to be delivered* at said warehouse to the next connecting company or carrier, it being expressly agreed that the said property is to be transported upon and in all respects subject to the conditions printed and endorsed hereon, which regulations and conditions form a part of this contract, and the acceptance of this contract is to be deemed evidence of notice of such regulations and conditions to and of assent thereto by the shipper, con-

signee and owner of said property; AND IT BEING FURTHER EXPRESSLY AGREED THAT THIS COMPANY ASSUMES NO LIABILITY, AND IS NOT TO BE HELD RESPONSIBLE AS COMMON CARRIERS,

For any loss of or injury to said property, after its arrival at its warehouse aforesaid,

Or for any loss or damage thereto, or any delay in transportation or delivery thereof by any connecting or succeeding company or carrier.

(Signed) J. C. HEITBAHN, Agent."

"ON BACK."

"8. *The corporation will only be liable as warehousemen after the property has been placed in their depot. But for loss or damage to property by fire while in their freight depot or warehouse, the company will not be liable.*

12. *GOODS OR PROPERTY CONSIGNED * * * * TO ANY POINT OR PLACE BEYOND ITS TERMINI WILL BE SENT FORWARD WITH AS REASONABLE DESPATCH AS THE GENERAL BUSINESS OF THE CORPORATION AT ITS WAREHOUSE WITHIN MENTIONED WILL ADMIT, BY A CARRIER OR FREIGHTMAN, WHEN THERE ARE SUCH KNOWN AT SAID WAREHOUSE, WILLING TO RECEIVE THE SAME UNCONDITIONALLY FOR TRANSPORTATION, THE COMPANY ACTING FOR THE PURPOSE OF DELIVERY TO SUCH CARRIER OR FREIGHTMAN AS THE AGENT OF THE CONSIGNOR OR CONSIGNEE, AND NOT AS CARRIERS.*

THE COMPANY WILL NOT BE LIABLE OR RESPONSIBLE FOR ANY LOSS, DAMAGE OR INJURY TO PROPERTY AFTER THE SAME SHALL HAVE ARRIVED AT THE WITHIN-MENTIONED COMPANY'S STATION FOR DELIVERY TO THE OWNER, CONSIGNEE, OR TO THE CONNECTING CARRIERS OR FREIGHTMAN FOR TRANSPORTATION." (R. pp. 35, 40, 109, 112, 151, 155, 162, 254, 269).

BILLS OF LADING.

"* * * * *IT IS FURTHER ESPECIALLY AGREED THAT FOR ALL LOSS AND DAMAGE OCCURRING IN THE TRANSIT OF SAID PACKAGES, THE*

LEGAL REMEDY SHALL BE AGAINST THE PARTICULAR CARRIER OR FORWARDER ONLY, IN WHOSE CUSTODY THE SAID PACKAGES MAY ACTUALLY BE AT THE TIME OF THE HAPPENING THEREOF, IT BEING UNDERSTOOD THAT THE SAID CHICAGO, MILWAUKEE & ST. PAUL RAILWAY COMPANY ASSUMES NO OTHER RESPONSIBILITY FOR THEIR SAFE CARRIAGE OR SAFETY THAN MAY BE INCURRED ON ITS OWN ROAD." (R. pp. 40, 112, 254).

These rules and conditions are not unreasonable. The last rule, especially, has the express sanction of this Court. They afford all needed protection to and are perfectly fair as between the several carriers making up the through route. And they inure to the benefit of each succeeding carrier in the line.

Manhattan Oil Co. vs. Camden & Amboy Railroad, 54 N. Y., 197.

Camden & Amboy Railroad vs. Forsythe Bros., 61 Pa. St., 81.

Taylor vs. Little Rock Railroad, 18 Am. & Eng. Railroad Cases, 590 596, and Notes.

Whitworth vs. Erie Railway, 6 Am. & Eng. Railroad Cases, 349.

Western Railway vs. Harwell, 91 Ala., 340.

Moghee vs. C. & A. Railroad, 45 N. Y., 514.

Lawson, Contracts of Carriers, 362 et seq.

Let it be always noted that the particular station receipts, way-bills and bills of lading, from which the above quotations are made, purport to be either originals or duplicates, and were placed in evidence by the interveners. (R. pp. 31, 105, 129). If the shippers

had not expressly, or by their course of business, assented to the said rules, stipulations and exemptions, they, equally with the St. Paul Company, are estopped in equity and all good conscience from repudiating them, by their subsequent course in preparing, receiving and using them as evidence of their contract and in support of their claims for loss filed against the receiver.

Even admitting, for argument's sake, that they were defective in execution, or that they had not been read and accepted by the shipper, or that they were absent entirely, surely the loss occasioned by any such neglect, failure or default should fall rather upon the initial carrier, whose duty it was to look after such details, than upon the succeeding carrier, which had a right to presume that proper receipts and bills had been taken and that they were in all respects customary, regular and in order.

The initial carrier was bound to the exercise of reasonable care and diligence in the premises.

Northern R. Co. vs. Fitchburg R. Co., 6 Allen 254.

Why should a court of equity refuse to the receiver, at least as against the St. Paul Company if not as against all the interveners, the full protection of all such reasonable stipulations and exemptions as it

has invoked in support of its claim against the receiver, and which it took, or should have taken, for its own protection as a common carrier.

Upon their face the foregoing stipulations constitute a perfect defense to these suits. If defective or ineffective for purposes of defense, by whose neglect and default was this permitted primarily to occur?

It is immaterial whether the shippers had any specific knowledge of the restrictions contained in these bills of lading, station receipts, and way-bills, since they have placed them in evidence as the contract of carriage upon which they seek to hold the carrier. They can not recover on a portion of this contract and repudiate the other portion. They are estopped to deny them or to attack or discredit them.

According to the English cases, and to a clear preponderence of authority in the United States, if a bill of lading is accepted by the shipper without objection, he is ordinarily presumed to have knowledge of, and to have assented to its terms, and he cannot afterwards be heard to say that he did not read it, but will be bound thereby.

This is the established rule both in Iowa and Minnesota, and the *lex loci* as to all the shipments herein from these States, *4 Am. and Eng. Ency., 2 Ed., 516*, but is not the rule in Illinois and Wisconsin, *Ib. 518*, nor in the United States Courts. *Mich. vs. Mineral Springs, 16 Wallace 318.*

Either the clause exempting the carriers from loss by fire after the goods had been warehoused, as provided in the station receipts, or the stipulation upon the face of the bills of lading that the "legal remedy shall be against the particular carrier or forwarder only in whose custody the said packages may ACTUALLY be at the time of the happening thereof," constitute, for the receiver, upon the facts of this case, a perfect equitable defense.

And this is true without reference to the question as to whether the contract of carriage was or was not a through contract, for the reason that the evidence conclusively establishes the fact that the goods had reached their destination, and that the contract of carriage, so far as the receiver was concerned, only bound him to the safe carriage of the barley from the beginning of his rails at Pekin, and to the delivery at the end of his rails at East St. Louis. If a through contract, the parties thereto were the St Paul and Rock Island companies and the receiver, and the through rate covered not only the transfer through Peoria over the Peoria & Pekin Union rails, but also the ultimate transfer over the rails and bridges of the Terminal Railroad Association from East St. Louis to St. Louis (R. pp. 128, 130, 131). The Terminal Association took its share of the through rate, and was bound to the conditions of liability in the event of ACTUAL CUSTODY.

The testimony is overwhelming that the exclusive and actual custody of the goods, including the cars of the St. Paul company, was in the Terminal Association. The Terminal Association is therefore bound as fully as the St. Paul company by the express terms of the orignal contract of carriage.

On the other hand, if there was no through contract, the decision of the Supreme Court of the United States in the case of *Railroad Co. vs. Manf. Co., 16 Wall, 318*, reaffirmed in *Insurance Company vs. The East St. Louis, Alton & Terre Haute Railroad Company, 104 U. S., supra*, establishes the proposition that the obligation of a carrier to the public should be limited by the termini of its own route. This is the well settled rule, often declared by this Court, and is written on the face of all the bills of lading involved herein.

The termini of the route of the receiver were unquestionably Pekin, Illinois, and East. St. Louis.

Even if we admit the strenuous contention of opposing counsel, that St. Louis and not East St. Louis was the destination of the barley, their case is not in the least helped.

For it is apparent that the legal obligation resting, in that event, upon the receiver, as carrier, was only to carry safely from the beginning of his rails at Pekin to the end of his rails at East St. Louis,

and there safely deliver to the next connecting carrier, which could only have been either the Wiggins Ferry or the Terminal Company. That the latter company was the designated connection appears fully from the evidence, frequently referred to herein, showing that the Terminal Company had solicited this business directly in its own behalf, from the consignees, and that the latter had especially selected it, as against the Wiggins Ferry Company, to receive the barley from the receiver and hold the same pending specific instructions from the consignees as to some more definite point of delivery in St. Louis, or elsewhere,

Whether the consignees were the owners, or the agent of the owners for the re-sale of the property upon commission, in either case, they had agreed with the Terminal Railroad Association for storage pending such resale, and were the parties responsible for further and final directions (often given directly to the Association) as to fresh destination and the particular place of delivery, to be designated by them. Such further transportation, as shown by the testimony, was always controlled by the Terminal Association as a common carrier, and with which the receiver had no concern, except as the mere agent through whom the consignee, in some instances, delivered his directions to the Association. The new way-bill, which was prepared by or under the directions of the consignee, which might have been given immediately or

after an indefinite delay, was not a continuation of the original carriage, or incident thereto, but was a new bill altogether, made after the sale of the property, and constituted, therefore, a new contract, with which the receiver had no concern, either as bailee or as common carrier.

Beyond all doubt, when the cars arrived at East St. Louis and were set to the designated "Ys," and were thence hauled by the Terminal to its yards and there deposited on its tracks in the place required, in the usual course of the consignee's business, for their convenience and subject to their disposal, carriage and delivery were alike complete. The fact that the barley, like other grain in bulk, and like hard coal, pig iron and salt, was for sale or re-sale in bulk to consumers, and after such re-sale was subject to further transportation to the particular brewer in St. Louis, or to Heinz' brewery, East St. Louis, or to Highland, or to Belleville, Illinois, or to the St. Louis breweries, did not in the least change the fact that the original contract of carriage had been fully executed, and the goods delivered, and that a second contract, to cover the fresh destination, was necessary and was made, wherein the consignee became the consignor and the purchasing consumer became the consignee. Nor does it matter whether the new way-bill covered a haul over the Eads bridge or the Merchants' bridge to some malthouse in St Louis, or over some other railroad to the

brewery in East St. Louis, or out in Illinois at Highland, or at Belleville, it is clear that all such points were beyond the receiver's lines, and that he had no interest in and owed no duty, either as carrier or warehouseman, in that behalf.

Finally, upon a most attentive study of this involved and often puzzling record, we submit:

1. That the confusion as between St. Louis and East St. Louis as place of destination grow out of the apparent ignorance of the shippers that East St. Louis was the port of entry for St. Louis—the distributing point for the consignees, pending re-sale on the market in St. Louis, for a fresh and final destination and carriage.

2. Independent, therefore, of the question as to whose possession the cars and contents were in, at the time of the loss, they were being held solely as warehouseman.

3. The receiver is sued as a carrier and recovery cannot be sustained against him as a warehouseman. In any event the liability was to the consignees and not to the consignors.

4. If any liability existed it was that of a warehouseman on the part of the Terminal Association to the consignees.

5. Until the receipt of the new way-bill by the Terminal Railroad Association, it held the goods as bailee for the consignee; after the receipt of the new bill it held them as common carrier. In either case no liability could fairly attach to the receiver.

6. In any event, upon any view of the evidence, it would, we confidently submit, be highly inequitable to hold the receiver responsible for the cars and contents while they were in the actual possession and exclusive custody of the Terminal Railroad Association, through whose negligence the loss occurred, while acting, in its own interest, on a direct agreement with the consignees.

Respectfully submitted,

Lilly Ford Wilson

Philip Barton Warren

Solicitors for Respondents.

Supreme Court of the United States.

No. 11.—October Term, 1900.

The Chicago, Milwaukee and St. Paul Railway Company, Petitioner,
vs.
C. H. Bosworth, Receiver of the Chicago, Peoria and St. Louis Railway Company, et al.

On writ of certiorari to the United States Circuit Court of Appeals for the Seventh Circuit.

[December 17, 1900.]

Mr. Justice White delivered the opinion of the Court.

The decision of the controversy presented in this record is controlled by the principles announced in the opinion just delivered in *Huntting Elevator Company* v. *Bosworth*, number 12 of this term. The claim of the railroad company was for the value of certain cars, admittedly owned by it, which had been received by the Peoria Company at various times on and prior to October 28, 1894, from a connecting carrier, upon shipments of barley from various points to commission merchants in St. Louis, the cars, except in one or two instances, being routed on the way bills to East St. Louis. The cars so taken by the Peoria Company were deposited on the tracks at East St. Louis set apart for the use of the Peoria Company under the circumstances disclosed in the opinion in the Huntting Elevator Company case, and, while awaiting orders from the consignees for further movement, were destroyed in the fire of October 28, 1894. The Circuit Court entered a decree in favor of the railroad company, but this decree was reversed by the Circuit Court of Appeals.

For the reasons stated in the opinion in the Huntting Elevator Company case, *the decree of the Circuit Court of Appeals must be reversed and the decree of the Circuit Court of the United States for the Southern District of Illinois affirmed.*

True copy.

Test:

Clerk Supreme Court, U. S.